(13)

No. 91-10-CFX
Status: GRANTED

Title: Spectrum Sports, Inc., et al., Petitioners
v.
Shirley McQuillan, et vir, dba Sorboturf Enterprises

Docketed:
July 1, 1991

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Vail,James D.

Counsel for respondent: Shohet,Jeffrey

NOTE--90th day was Sun., 6/30.

Entry	Date	Note	Proceedings and Orders
1	Jul 1 1991	G	Petition for writ of certiorari filed.
2	Jul 25 1991		Brief of respondents Shirley McQuillan, et vir, etc. in opposition filed.
3	Jul 31 1991		DISTRIBUTED. September 30, 1991
4	Aug 5 1991	X	Reply brief of petitioners Spectrum Sports, Inc., et al. filed.
5	Aug 26 1991		Record requested.
7	Sep 20 1991		Record filed.
		*	Certified record and briefs - United States Court of Appeals, Ninth Circuit.
6	Sep 23 1991		Record filed.
		*	4 boxes - original proceedings United States District Court, Southern District of California.
8	Oct 2 1991		REDISTRIBUTED. October 18, 1991
9	Oct 21 1991	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
10	Feb 27 1992		Brief amicus curiae of United States filed. VIDED.
12	Mar 2 1992	X	Reply brief of respondent Shirley McQuillan, et vir, etc. filed. VIDED.
11	Mar 4 1992		REDISTRIBUTED. March 20, 1992
13	Mar 12 1992	X	Reply brief of petitioners Spectrum Sports, Inc., et al. filed.
14	Mar 16 1992	X	Brief of respondents Shirley McQuillan, et vir, etc. in response to supplemental brief of petitioners Sorbothane, et al. filed.
16	Mar 23 1992		REDISTRIBUTED. March 27, 1992
17	Mar 30 1992		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
19	Apr 29 1992		Order extending time to file brief of petitioner on the merits until May 29, 1992.
20	May 27 1992		Brief amicus curiae of United States filed.
21	May 28 1992		Joint appendix filed.
22	May 28 1992		Brief of petitioners Spectrum Sports, Inc., et al. filed.
23	Jun 3 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Jun 15 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

2 pp

No. 91-10-CFX

Entry	Date	Note	Proceedings and Orders
25	Jun 26 1992		Brief of respondents Shirley McQuillan, et vir, etc. filed.
26	Jul 14 1992		CIRCULATED.
27	Jul 24 1992	X	Reply brief of petitioner Spectrum Sports, Inc., et al. filed.
28	Aug 21 1992		SET FOR ARGUMENT TUESDAY, NOVEMBER 10, 1992. (3RD CASE).
29	Nov 3 1992	G	Motion of respondents for leave to file a supplemental joint appendix filed.
30	Nov 9 1992		Motion of respondents for leave to file a supplemental joint appendix GRANTED.
31	Nov 10 1992		ARGUED.

No. 91-10

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON,
Petitioners,

vs.

SHIRLEY MCQUILLAN and LARRY MCQUILLAN
dba SORBOTURF ENTERPRISES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below are those named in the caption and Sorbothane, Inc., Hamilton-Kent Manufacturing Company, Inc., Kenneth M. Leighton and BTR, Inc. Spectrum Sports, Inc. has no parent or subsidiary corporations.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 3

JURISDICTIONAL STATEMENT 4

STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 9

I. THE COURT SHOULD STRIKE DOWN THE CONCEPTUALLY FLAWED NINTH CIRCUIT RULE WHICH IMPOSES TREBLE DAMAGES WITHOUT REQUIRING EVIDENCE OF CONDUCT ADVERSE TO COMPETITION 9

A. *Lessig* Contradicts The Rule Set Forth By This Court 9

B. *Lessig* Has Been Rejected By Every Other Circuit Court of Appeals 11

C. *Lessig's* Elimination Of The Dangerous Probability Of Success Element Has Been Soundly Criticized By Legal Commentators 14

D. Liability For Attempting To Monopolize Should Not Be Imposed Solely Because Of A Defendant's Unfair Behavior 15

E. The *Lessig* Rule Is Particularly Inappropriate In Distributor Substitution Cases Where Competition Is Rarely Affected 16

II. THE NINTH CIRCUIT'S FAILURE TO REQUIRE PROOF OF ANTITRUST INJURY IS PARTICULARLY HARMFUL IN THIS DISTRIBUTOR SUBSTITUTION CASE WHERE ANTITRUST INJURY CANNOT BE SHOWN 18

A. The Ninth Circuit Ignored This Court's Rule That A Private Plaintiff Must Prove Antitrust Injury 18

B. Since Distributor Substitutions Do Not Harm Competition, No Antitrust Injury Occurs 19

CONCLUSION 23

APPENDIX:

Decision of the United States Court of Appeals for the Ninth Circuit (July 3, 1990) A1

Judgment of the United States District Court for the Southern District of California (August 12, 1988) A29

Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing *En Banc* (April 1, 1991) A32

TABLE OF AUTHORITIES

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A. H. Cox v. Star Machinery Co., 653 F.2d 1302, 1307 (9th Cir. 1981) 16,20

American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1366 (Fed. Cir.), *cert. denied*, 469 U.S. 821 (1984) 13

American Key Corp. v. Cole Nat. Corp., 762 F.2d 1569, 1579-1581 (11th Cir. 1985) 11

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. _____, 110 S. Ct. 1884 (1990) 2,8,18

Blanton v. Mobil Oil Corp., 721 F.2d 1207, 1214 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007 (1985) 15

Bright v. Moss Ambulance Service, Inc., 824 F.2d 819, 824 (10th Cir. 1987) 11

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 18,21

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 19

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 19,20

Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802 (6th Cir. 1988) 20

CVD, Inc. v. Raytheon Co., 769 F.2d 842 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) 11

Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) 11

General Industries Corp. v. Hartz Mountain Corp., 810 F.2d 795, 804 (8th Cir. 1987) 11

International Distribution Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786 (2nd Cir.), *cert. denied*, 482 U.S. 915 (1987) 11,12

Janich Bros. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) 10

Lessig v. Tidewater Oil Company, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) ..... *passim*

Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951) 9

Military Services Realty, Inc. v. Realty Consultants of Virginia, Ltd., 823 F.2d 829 (4th Cir. 1987) 11

Mobil Oil Corporation v. Blanton, 471 U.S. 1007 (1985) 14

Multiflex v. Samuel Moore & Co., 709 F.2d 980, 991 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) . 11

Neumann v. Reinforced Earth Comany, 786 F.2d 424 (D.C. Cir.), *cert. denied*, 479 U.S. 851 (1986) 12,13

Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832, 841 (2d Cir. 1980) 11

Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2nd Cir.) (*en banc*), *cert. denied*, 439 U.S. 946 (1978) ... 21

Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 711-712 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) 13

Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (6th Cir. 1982) 11

Rutman Wine Co. v. E.&J. Gallo Winery, 829 F.2d 729 (9th Cir. 1987) 21

Swift & Co. v. United States, 196 U.S. 375 (1905) 9,10

United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377, 386 (1956) 19

United States v. Griffith, 334 U.S. 100, 105-106 (1948) 9

Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 198 U.S. 172 (1965) 10,13

Federal Statutes

15 U.S.C. §2 ..... *passim*

15 U.S.C. §15 5,6,18

18 U.S.C. §1964 6

28 U.S.C. §1254(1) 4

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E. Kinter, *Federal Antitrust Law*, §13.4 (1980) 15

No. _____

_____

IN THE

Supreme Court of the United States

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October Term, 1990

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SPECTRUM SPORTS, INC. and
KENNETH B. LEIGHTON,
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vs.

SHIRLEY MCQUILLAN and LARRY MCQUILLAN
dba SORBOTURF ENTERPRISES,
Respondents.

_____

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Spectrum Sports, Inc. ("Spectrum Sports") and Kenneth B. Leighton respectfully pray that a writ of certiorari issue to review the decision of the Ninth Circuit, dated July 3, 1990, which appears in the Appendix at A1.

This decision affirmed the trial court's judgment solely on the basis of Respondents' attempted monopoly claim, even though no evidence of Spectrum Sports' market power or its specific intent to monopolize was produced. The Ninth Circuit's decision was based on its unique rule, first announced in *Lessig v. Tidewater Oil Company*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), which eliminates "a dangerous probability of success" and "specific intent to monopolize" as independent elements of an attempt to monopolize claim. This Ninth Circuit rule conflicts with decisions of this Court and of every other Circuit Court of Appeals.

The Ninth Circuit affirmed the imposition of treble damages even though Respondents were not required to—and could not—prove antitrust injury, as defined by this Court in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. _____, 110 S. Ct. 1884 (1990). Antitrust injury cannot occur because a substitution of exclusive distributors does not harm competition.

OPINIONS BELOW

The Opinion of the Ninth Circuit appears in the Appendix at A1. The judgment of United States District Court for the Southern District of California appears in the Appendix at A29. The order of the Ninth Circuit denying the petition for rehearing appears in the Appendix at A32. All are unreported memorandum decisions.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was entered on July 3, 1990. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on April 1, 1991.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. §15, provides in relevant part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Parties.

Respondents, Shirley and Larry McQuillan, doing business as Sorboturf Enterprises, distributed athletic insoles to retailers in the western United States. The insoles were made of sorbothane, a patented, shock-absorbing polymer. Respondents initially purchased the insoles from Hamilton-Kent Manufacturing Company beginning in 1981 and later from Sorbo, Inc., both of which were indirect subsidiaries of BTR, Inc. Spectrum Sports also distributed sorbothane athletic insoles purchased from Hamilton-Kent and Sorbo and resold them in those parts of the United States not served by Respondents. Spectrum Sports and Respondents resold the insoles only in their respective territories as part of the manufacturer's distribution plan. Sorbo terminated Respondents as distributors in 1983 and replaced them with Spectrum Sports which thereafter became the exclusive national distributor of sorbothane athletic insoles.

Respondents' Lawsuit.

Respondents sued Spectrum Sports and its president, Kenneth B. Leighton, Hamilton-Kent, Sorbo and its president, Kenneth M. Leighton, and BTR, Inc. alleging a number of federal and state law violations.[1] After trial, the jury, by special verdict, found Petitioners neither fixed prices in violation of Section 1 of the Sherman Act nor violated California's Cartwright Act prohibiting conspiracies to restrain trade. The jury did find Petitioners had violated Section 2 of the Sherman Act. The jury also found Petitioners did not defraud

[1] Jurisdiction was based upon 15 U.S.C. §15 and 18 U.S.C. §1964.

Respondents. Nonetheless, the jury held Petitioners liable for three RICO violations based upon these same fraud claims. The jury also found Petitioners liable for state law unfair competition and interference with prospective business advantage claims. The jury awarded damages of $1,743,000 which was trebled by the trial court. The trial court also awarded attorneys fees and costs.

Petitioners' Appeal.

Petitioners appealed, asserting they were entitled to judgment as a matter of law on the Section 2 claim because Respondents offered no proof of Spectrum Sports' market power or of its specific intent to monopolize any relevant market. Petitioners also argued that the trial court had erred by not requiring Respondents to prove antitrust injury.

Petitioners appealed the RICO verdict on the basis that the jury had determined that Petitioners were not liable for the fraud on which the RICO claims were based. Further, under California law, Respondents were not entitled to monetary relief on their unfair competition claim. Finally, the interference claim was meritless because Petitioners did not participate in Sorbo's termination of Respondents' distributorship.

The Ninth Circuit Decision.

The Court of Appeals affirmed the trial court's judgment, stating there to have been adequate evidence to support a judgment of attempt to monopolize under the Ninth Circuit's *Lessig* rule. The Ninth Circuit relied upon evidence of price fixing which the jury had rejected in exonerating Petitioners on the Section 1 price-fixing claim. Appendix, A15-A22. It specifically declined to reach any of the other substantive issues. Appendix at A28.

Petition For Rehearing.

After the case had been argued on April 13, 1990, but before the Ninth Circuit's decision of July 3, 1990, this Court decided the case of *Atlantic Richfield Co. v. USA Petroleum*, 495 U.S. _____, 110 S. Ct. 1884 (1990). Petitioners filed a petition for rehearing with a suggestion for rehearing *en banc* on July 17, 1990.

Petitioners apprised the Ninth Circuit of this Court's rule that a private plaintiff must prove "antitrust injury" as part of its claim. Petitioners also asked the court to reconsider the *Lessig* rule, particularly in light of the jury's exoneration of Petitioners on the Section 1 claim, and because competition was not likely to be harmed in this distributor substitution case.

On April 1, 1991 the Court of Appeals corrected its earlier decision by acknowledging Petitioners had properly objected to the *Lessig* instruction, but nonetheless denied the petition for rehearing. Appendix, A32.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD STRIKE DOWN THE CONCEPTUALLY FLAWED NINTH CIRCUIT RULE WHICH IMPOSES TREBLE DAMAGES WITHOUT REQUIRING EVIDENCE OF CONDUCT ADVERSE TO COMPETITION.

A. *Lessig* Contradicts The Rule Set Forth By This Court.

The curious rule announced in *Lessig v. Tidewater*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) has plagued parties subject to the jurisdiction of the Ninth Circuit—and has been criticized by highly respected legal commentators—for more than 25 years. Solely on the basis of *Lessig*, the Ninth Circuit imposed treble damages upon Petitioners even though Respondents produced no evidence of Petitioners' market power or of their specific intent to monopolize.

This Court has long required a plaintiff in an attempt to monopolize claim to prove: (1) predatory or anticompetitive conduct, (2) specific intent to monopolize, and (3) a dangerous probability of success. *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951); *United States v. Griffith*, 334 U.S. 100, 105-106 (1948); *Swift & Co. v. United States*, 196 U.S. 375 (1905). Justice Holmes explained the basis for the Court's rule:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.

Swift & Co. v. United States, 196 U.S. at 396 (citation omitted).

The Court again considered the need to prove "dangerous probability of success" in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 198 U.S. 172 (1965). In *Walker Process*, the defendant asserted plaintiff's fraudulent acquisition and maintenance of a patent constituted an attempt to monopolize in violation of Section 2. The Court held that measuring the "dangerous probability of success element" requires an analysis of market power.

> To establish monopolization or attempt to monopolize a part of trade or commerce under §2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition.

Id. at 177.

The current version of *Lessig*—applied by the Ninth Circuit here—ignores this Court's rule and permits "dangerous probability of success" to be inferred from evidence of specific intent to monopolize which may, in turn, be inferred from anticompetitive or predatory conduct. *See, e.g., Janich Bros. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). It does not require evidence of the defendant's share of any relevant market, and makes no distinction between a defendant with a 90% share of a relevant market and one with 9%. Accordingly, liability may be imposed in the Ninth Circuit without any indication of a defendant's ability to monopolize a particular market. This result conflicts directly with the rulings of this Court and requires Supreme Court review.

B. *Lessig* Has Been Rejected By Every Other Circuit Court Of Appeals.

No other Circuit has adopted the Ninth Circuit's shortcut approach.[2] The Second Circuit specifically rejected the *Lessig* rule in *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2nd Cir.) *cert. denied*, 482 U.S. 915 (1987) on the basis that to do otherwise would be to unnecessarily extend antitrust law into areas not affecting competition.

> Moreover, IDC's argument ignores the history of judicial interpretations of the term "monopoly" as it relates to both the substantive act and the attempt. We have consistently interpreted both monopoly and the attempt to monopolize as requiring some measure of market power . . .
>
> *Eliminating the dangerous probability element from attempted monopolization would have the effect of extending the coverage of section 2 of the Sherman Act to similar behavior already covered by state and federal law.* The Federal Trade Commission Act, Section Five, 15 U.S.C. Section 45 (1982), regulatory statutes and state business tort law all reach anticompetitive behavior by firms that lack market power . . . There is no unmet need calling for judicial expansion of section 2 to reach similar behavior. *See*, 3 *Areeda & Turner*, Section 833 (D) at 341.

[2] *E.g., Bright v. Moss Ambulance Service, Inc.*, 824 F.2d 819, 824 (10th Cir. 1987); *Military Services Realty, Inc. v. Realty Consultants of Virginia Ltd.*, 823 F.2d 829 (4th Cir. 1987); *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987); *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *American Key Corp. v. Cole Nat. Corp.*, 762 F.2d 1569, 1579-1581 (11th Cir. 1985); *Multiflex v. Samuel Moore & Co.*, 709 F.2d 980, 991 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

Furthermore, any significant reduction in the antitrust plaintiff's burden of proving that the defendant has a dangerous probability of monopolizing the market might discourage the healthy competition that section 2 is intended to nurture.

Id. at 791 (emphasis added).

Judge Bork, writing for the D.C. Circuit, also considered and rejected the *Lessig* rule, in *Neumann v. Reinforced Earth Company*, 786 F.2d 424 (D.C. Cir.) *cert. denied*, 479 U.S. 851 (1986), a case in which the plaintiff asserted that the defendant was guilty of sham litigation in violation of Section 2. Judge Bork objected to applying antitrust law without some assurance that competition might be harmed.

> It might be argued that there should be no need to prove the element of market power, or a dangerous probability of success, separately. If a tactic, including litigation, is really predatory (i.e., in this same case a sham: known to be without merit), that fact might seem to establish a dangerous probability of success. . . . A company that undertakes sham litigation, it may be supposed, thereby demonstrates that it thinks itself close to success and courts could reasonably take the defendant's informed belief as proof enough. In price fixing cases, after all, courts do not require the plaintiff to prove the defendants' market power, though price fixing by those without market power would be quite harmless, because we suppose that the conspirators know the market best and we take their beliefs as sufficient. That is one of the things that is meant when naked price-fixing is said to be illegal *per se. The required showing of "dangerous probability," however, may provide a court with some assurance, otherwise lacking, that the bad faith litigation constitutes an anticompetitive act and is not merely legal harassment for personal motives.* In the latter case

> the appropriate action would be one in tort for abuse of process or malicious prosecution, not one invoking the full panoply of the antitrust laws, including recovery of triple damages. *In any case, and whatever the reason, the law does require a dangerous probability of success, and Neumann, in order to prevail was required to show RECO's share of the relevant market.* He did not succeed.

Id. at 428 (emphasis added).

Lessig was also specifically rejected in *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 711-712 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) and *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1366 (Fed. Cir.), *cert. denied*, 469 U.S. 821 (1984) (where the court stated *Lessig's* significance was diminished after this Court decided *Walker Process*).

Justice White, in urging this Court to consider the *Lessig* rule, asserted that the notion of *Lessig's* refusal to inquire about the defendant's market power was particularly inappropriate in Section 2 cases where the risk of injury to competition is small.

> Sections 1 and 2 of the Sherman Act are directed to different sorts of threats to competition in our economy. Section 1 proscribes concerted action—contracts, combinations, and conspiracies in restraint of trade. Such concerted action is so inherently threatening to competition that in certain instances it is forbidden without regard to whether it has actually damaged competition in a particular market. Section 2 regulates unilateral conduct by outlawing monopolization and attempted monopolization. Because unilateral conduct is far less likely than concerted action to pose a threat to competition, "[t]he conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984).

> Because the *Lessig* doctrine allows a violation of §2 to be found on the basis of a *per se* violation of §1, without regard to the effect of a defendant's conduct in any relevant market, it appears to be in tension with these principles.

Mobil Oil Corporation v. Blanton, 471 U.S. 1007 (1985) (White, J., dissenting).

Every other Circuit has recognized the illogic of the *Lessig* rule. This Court's overturning *Lessig* would promote a consistent and reasoned interpretation of the antitrust laws.

C. *Lessig's* Elimination Of The Dangerous Probability Of Success Element Has Been Soundly Criticized By Legal Commentators.

The *Lessig* rule has been criticized since its conception:

> This is indeed a curious result. If "dangerous probability" has any meaning at all, it must signify an approach to monopoly power. As monopoly power itself is measured in terms of a relevant market, so must dangerous probability also be measured. Unless you know where a defendant is heading, you cannot find out how close he is to the destination. Thus, the concept of dangerous probability is only meaningful in the context of relevant market. . . .
>
> Under the *Lessig* analysis, any business tort may become an attempt to monopolize case . . . In other words, the *Lessig* approach reeks of over kill.

Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. Antitrust L. J. 165, 171 (1967).

Lessig's survival has prompted further criticism. Areeda and Turner have criticized *Lessig*, pointing out that even where proof exists of a *per se* violation of

Section 1, attempted monopolization cannot be established without identifying a market that may be monopolized. P. Areeda and D. Turner, *Antitrust Law*, §832(1)(a), (1989 Supplement).

Professor Kintner has stated:

> *Lessig* and the less radical departures from the dangerous probability requirement discussed above would profoundly change the attempt to monopolize offense if those departures were eventually adopted by more courts. The plaintiff's burden of proof would be substantially eased because definition and evaluation of the relevant product and geographic markets would no longer be required. The attempt offense would be significantly expanded to encompass at least some unilateral anticompetitive conduct by actors lacking substantial market power. These approaches effectively abandon the traditional view of the attempt offense, which links attempts with monopolization.

E. Kinter, *Federal Antitrust Law*, §13.4 (1980).

The longstanding criticism by academic commentators demonstrates *Lessig's* basic misunderstanding of the antitrust laws and compels its being overturned.

D. Liability For Attempting To Monopolize Should Not Be Imposed Solely Because Of A Defendant's Unfair Behavior.

Until now, the Ninth Circuit limited the application of the *Lessig* rule to cases where a defendant was found liable for a *per se* Section 1 violation. The Section 1 violation then served as the basis to infer the other Section 2 elements. *See e.g., Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1214 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007 (1985). Here, however, the jury found

Petitioners *did not* fix prices in violation of Section 1; yet the Ninth Circuit relied on purported evidence of price fixing—which did not rise to the level of anticompetitive conduct—to form the basis of a *Lessig* inference upon an inference. The Ninth Circuit, in this opinion, allowed antitrust liability to be imposed upon the mere showing of *unfair* behavior, Appendix, A17, A19 and A21. Thus in the Ninth Circuit, unfair—not anticompetitive—conduct, may constitute a Section 2 violation and result in the imposition of treble damages. The antitrust laws were not designed to punish this behavior.

E. The *Lessig* Rule Is Particularly Inappropriate In Distributor Substitution Cases Where Competition Is Rarely Affected.

The Ninth Circuit now applies *Lessig* to distributor substitution cases, which, by their nature, are unlikely to negatively affect competition. As Judge (now Justice) Kennedy stated:

> That one distributor will be hurt when another succeeds in taking its line is axiomatic in some markets, as it was here, but the intent to cause the result is not in itself prohibited by the antitrust laws. The intent proscribed by the antitrust laws lies in the purpose to harm competition in the relevant market, not to harm a competitor.

A. H. Cox v. Star Machinery Co., 653 F.2d 1302, 1307 (9th Cir. 1981).

The application of *Lessig* to a distributor substitution case compounds the *Lessig* problem. Not only are treble damages imposed in attempt to monopolize claims without the need for proof of damage to competition, but now that rule is applied to distributor substitutions which, by their very nature, do not harm competition.

The Court of Appeals' decision makes clear that—despite years of criticism—the Ninth Circuit intends not only to continue its adherence to *Lessig*, but to stray further from the rule of this Court and the other Circuits in attempt to monopolize claims. Occasionally, where one court of appeals interprets a statute differently than others, Supreme Court intervention may be unnecessary because, in time, the aberrant circuit may see the error of its ways. But in other cases, as here, where the Ninth Circuit has relied for more than 25 years on the *Lessig* rule and appears to be solidifying its isolation, it is time for the Supreme Court to act. Such action is all the more vital where this divergent rule results in awards of treble damages.

II. THE NINTH CIRCUIT'S FAILURE TO REQUIRE PROOF OF ANTITRUST INJURY IS PARTICULARLY HARMFUL IN THIS DISTRIBUTOR SUBSTITUTION CASE WHERE ANTITRUST INJURY CANNOT BE SHOWN.

A. The Ninth Circuit Ignored This Court's Rule That A Private Plaintiff Must Prove Antitrust Injury.

The Ninth Circuit ignored this Court's recent holding that a private plaintiff may not seek treble damages under Section 4 of the Clayton Act unless it has suffered antitrust injury. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. _____, 110 S. Ct. 1884, 1894 (1990) (stating that the "antitrust injury requirement insured that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect of the defendant's behavior.") (emphasis in original). Antitrust injury is injury that the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977).

The Ninth Circuit, in determining Respondents suffered antitrust injury, relied upon the same faulty reasoning that led to its reversal in *Atlantic Richfield:*

> Horizontal market division agreements (Section 1 claim) and attempts to monopolize (Section 2 claim) are treated as *per se* violations of the Sherman Act. Injury to competition is presumed to follow from the conduct proscribed by these statutes.

Appendix, A22.

Not only did this Court reverse such a rule in *Atlantic Richfield*, but as demonstrated below, injury to competition cannot be presumed in a distributor substitution case.

B. Since Distributor Substitutions Do Not Harm Competition, No Antitrust Injury Occurs.

To determine if antitrust injury has—or can—be proven, one must first determine why monopolization and attempting to monopolize were prohibited. The Sherman Act sought to prevent monopolization because of the fear the monopolist would be able to control prices and threaten competition. *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 386 (1956).

This Court has recognized the minimal impact on competition caused by a change in distributors. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Court stated:

> Certainly, there has been no showing ... that vertical restrictions have a "pernicious effect on competition" or that they "lack ... any redeeming virtue. (citation omitted)

Id. at 433 U.S. at 58.

More recently, in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), this Court reaffirmed its position that vertical non-price restraints must be judged by a rule of reason and not a *per se* test because no demonstrable economic harm results from these restraints.

Although in *Sylvania* and *Business Electronics* the Court considered the issue of whether to apply the rule of reason analysis to certain vertical restraints—not the issue of antitrust injury—the reasoning employed in those cases is equally applicable here. If competition is unlikely to be affected when one exclusive distributor is replaced by another—one type of vertical restraint—then certainly the replaced distributor cannot suffer the type of damage the antitrust laws were designed to protect against.

Justice Kennedy addressed this in *A. H. Cox v. Star Machinery Co.*, 653 F.2d 1302 (9th Cir. 1981), where one exclusive distributor was replaced by another:

> Most cases recognizing the right to establish an exclusive manufacturer-dealer relation arise when an arrangement is formed or changed at the request of the manufacturer ... *It is widely recognized moreover, that in most circumstances dealer terminations or substitutions do not adversely affect competition in the market.* (citations omitted)

Id., at 1306-1307 (emphasis added).

The Sixth Circuit has considered distributor terminations several times in the context of Section 1 claims and has consistently dismissed such claims, holding that they may not be analyzed on a *per se* basis and must fail on a rule of reason test. In *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802 (6th Cir. 1988), the court detailed the history of distributor substitution cases in the Sixth Circuit starting with this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, holding that these claims cannot be analyzed on a *per se* basis because the court presumes that interbrand competition is not negatively affected by the mere replacement of one distributor by another.

> We have consistently held that a complaint which simply alleges that a manufacturer substituted one distributor for another fails to state a violation of the rule of reason, *unless* it also alleges anticompetitive effect at the interbrand level. (emphasis in the original)

Id. at 806.

If interbrand competition were damaged by a distributor substitution, then distributors of competing products or retailers might suffer antitrust injury, but not the replaced distributor.

The Ninth Circuit addressed the antitrust injury issue in the context of distributor substitutions in *Rutman Wine Co. v. E.&J. Gallo Winery*, 829 F.2d 729 (9th Cir. 1987). In *Rutman*, the manufacturer replaced one exclusive distributor with another and the disappointed distributor asserted violations of Sections 1 and 2 of the Sherman Act. The court, in affirming the dismissal of the complaint, stated:

> While appellant clearly pleads injury to itself, its conclusion that competition has been harmed thereby does not follow. Rutman charges that its termination was accomplished to prevent, reduce, and unreasonably limit competition in the market. Gallo responds that injury to appellant and injury to Gallo's competitors are not injury to competition. Appellee persuasively argues that appellant can prove no set of facts consistent with the allegations of its complaint which would entitle it to relief.

Id. at 734-735.

The Second Circuit, in *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2nd Cir.) (*en banc*), *cert. denied*, 439 U.S. 946 (1978), held that the replacement of one distributor by another was not enough to constitute a *per se* violation of Section 1 of the Sherman Act. Although the court held only that distributor terminations should be analyzed under the rule of reason and not on a *per se* test, the court based its decision, in part, on the antitrust injury analysis in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, specifically that the antitrust laws were enacted for the protection for competition, not competitors. *Oreck*, 579 F.2d at 133-134.

The basic issue in a distributor substitution case is not whether to apply a *per se* or rule of reason analysis, but to determine whether or not a replaced distributor can suffer antitrust injury. Here, without injury to competition (intrabrand or interbrand) or control of prices, antitrust injury cannot be established. The only parties that suffered were Respondents; but their injury was not the type of injury the antitrust laws were designed to prevent.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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June 28, 1991

APPENDIX

NOT FOR PUBLICATION

MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(Filed July 3, 1990)

Case No. 89-55326
89-55329
89-55332

SHIRLEY McQUILLAN, *et al.*,
Plaintiffs/Appellees/
Cross-Appellants,

vs.

SORBOTHANE, INC., *et al.*,
Defendants/Appellants/
Cross-Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William B. Enright, District Judge, Presiding

Argued and Submitted April 13, 1990
Pasadena, California

Before: TANG and O'SCANNLAIN, *Circuit Judges*, and MARQUEZ, *District Judge*.**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Alfredo C. Marquez, United States District Judge for the District of Arizona, sitting by designation.

This is an action brought by Shirley McQuillan and Larry McQuillan, individually and dba Sorboturf Enterprises (McQuillan) against the defendants BTR, Inc., Hamilton-Kent Manufacturing Company (H-K), Sorbothane, Inc. formerly Sorbo, Inc., Kenneth M. Leighton, Sr., Spectrum Sports, Inc. and Kenneth B. Leighton, Jr. Claims were asserted under federal and state antitrust laws, RICO, breach of contract, fraud, unfair competition, bad faith denial of existence of a contract, and conversion.

The jury, after a lengthy trial, found against the defendants BTR, Inc., H-K, Sorbothane, Inc. and Leighton, Sr. on all Counts. Spectrum and Leighton, Jr. were found liable on the claims for unfair competition (Section 17200 California Business and Professions Code), interference with prospective business advantage, violation of Section 2 of the Sherman Act, and violations of the RICO Act, 18 U.S.C. §1962(b), (c), and (d). The jury found that H-K was the agent or alter ego of BTR, Inc.

The jury assessed $1,743,000 in each of the claims on which the defendants were found liable. The District Court entered judgment in the sum of $5,243,000 (compensatory damages trebled), together with reasonable attorneys fees and costs.

McQuillan moved for attorneys fees under the state and federal antitrust laws and the RICO laws. The application sought fees of $1,759,969, reflecting 9,008.4 hours at a rate of $130.94 per hour. McQuillan additionally sought an enhancement for delay of $137,358, and an enhancement of 33% ($436,684) for the risk of non-payment, for total enhancement of $574,042.00 which the Court denied. The Court awarded the sum of $912,032.50 for attorneys fees.

Defendant/Appellants appeal from the jury verdicts and challenge certain trial court rulings relating to the testimony of the plaintiffs' expert, a Motion in Limine granted by the Court, denial of Motions for a New Trial, Directed Verdict, and JNOV, and certain instructions given by the Court.

McQuillan appeals the District Court's denial of the request for enhancement of attorneys fees.

FACTS AND PROCEEDINGS BELOW

Conflicts in the evidence have been resolved in favor of the party who prevailed on a particular claim.

Sorbothane is a viscous elastic polymer invented by Dr. Maurice Hiles in England. It is a solid that absorbs energy like a liquid. Dr. Hiles' work on Sorbothane was funded by British Technology Group [BTG].

BTR, Inc. [BTR], a Delaware corporation, is a holding company which at all relevant times owned, directly or indirectly, H-K and Sorbothane, Inc. [S.I.]. Up to May 1982, S.I. was the Sorbo Division of H-K.

In 1982 S.I. was formed to take over H-K's Sorbothane business.

Spectrum Sports, Inc. [Spectrum] is an Ohio corporation, formerly Ohio Cushions, Inc., and is owned by Kenneth B. Leighton [Jr.] and Michael Silvestro.

Kenneth M. Leighton, Sr. [Sr.] is Jr.'s father. He served as President of H-K and S.I. at all relevant times. He became interested in Sorbothane and in August 1980 an unrestricted license to manufacture and sell Sorbothane "in all world markets" was granted to H-K by B.T.R. Development Services Ltd.

At all times material herein John Cahill was President of BTR, Chairman of H-K, and possibly a Director of H-K. He was also a member of the Board of S.I.

A United Kingdom Company, Birmingham and Leyland [Leyland], was also licensed to manufacture and sell Sorbothane without territorial restrictions.

In 1980, Dr. Hiles was hired as a consultant to H-K in the United States.

When Shirley McQuillan read a magazine article in the spring of 1980 about the shock absorbent qualities of Sorbothane, she thought it might work as a horseshoe pad. McQuillan, along with acquaintance Alby Jardine, contacted Dr. Hiles in England. The McQuillans and the Jardines formed a company called Safe and Sound as a base to develop Sorbothane equestrian products.

Jr. was then Vice President of Marketing for H-K. McQuillan presented to H-K a letter of intent regarding their prospective business relationship. The letter of intent, signed by Sr., President of H-K, anticipated a definitive agreement granting Safe and Sound the exclusive right to purchase Sorbothane for resale as equestrian products.

In the summer of 1981, McQuillan resigned from Safe and Sound. She and her husband Larry formed a company called Sorboturf for their Sorbothane development. While McQuillan was developing a Sorbothane horseshoe pad, H-K was attempting to develop a national market for other Sorbothane products, including athletic shoe inserts and medical products.

Sr., along with H-K's marketing manager Laurene Heinsohn, decided to use regional distributors. In December 1982 Heinsohn left S.I. and was employed by Spectrum Sports.

McQuillan and her company Sorboturf were selected as the distributor for the southwestern United States. Jr., at the time Vice President of Marketing at H-K, decided that he too wanted to be a distributor. In addition to Sorboturf and Jr.'s company Spectrum Sports, the other distributors were Myron McCone (Shirley McQuillan's father) and his company RHR, Inc., Triad Research (Marty Vogel), and Absorbotech (Arnie Lund). The distributorships were established by early August, 1981.

On September 15, 1981, H-K sent to McQuillan a letter enclosing a price list. Sorboturf thereafter began buying and distributing Sorbothane products. Shortly after Sorboturf began distributing Sorbothane in the fall of 1981, McQuillan received from H-K a draft contract. H-K's proposed contract suggested that either party could terminate upon sixty days notice. McQuillan protested that she would not invest substantial time and money in developing the Sorbothane market if H-K could terminate her distributorship without cause.

H-K required its regional distributors to agree to fix wholesale and retail prices. Thus, McQuillan and each distributor were required to agree to sell to retailers at a fixed markup and further, to "police" the retailers to prevent discounting at the retail level. Heinsohn told the distributors that if they learned of retailers discounting the product, the offending retailer was to be cut-off. Heinsohn warned the distributors that violating the pricing agreements would jeopardize their distributorships.

In January 1982, there was a meeting in Jr.'s office involving Sr., Jr., Heinsohn and John Burne. Burne, through his company IEM, had marketed Sorbothane in England. In late 1981, Burne had proposed becoming the

national Sorbothane medical distributor in the United States. Heinsohn objected, pointing out that H-K had already committed the medical market to the regional distributors. By the time of the January, 1982 meeting, Sr. had appointed IEM as the national medical distributor.

McQuillan had always paid her H-K invoices within thirty days. In addition to meeting her obligations as an athletic distributor, McQuillan had continued to work diligently with Dr. Hiles to develop a marketable Sorbothane horseshoe pad.

In April 1982, Sr. called a meeting in Chicago with McQuillan, her father, and Heinsohn. Sr. told Heinsohn that the purpose of the meeting was to move McQuillan out of the athletic market by making her right to distribute equestrian products conditional upon the relinquishment of her athletic distributorship.

In May, 1982, McQuillan attended a meeting at the S.I. facility in Ohio. Attendees included Sr., Jr., Heinsohn, Dr. Hiles and John Forsyth, a Sorbo, Inc. engineer. As of May 1982, the Sorbothane business had been moved by BTR, Inc. from H-K to Sorbo, Inc. Heinsohn moved to Sorbo, Inc. as its marketing manager.

After the meeting, Heinsohn made it clear to McQuillan that McQuillan had to sell her athletic distributorship to Jr. to keep the equestrian distributorship rights. Heinsohn scheduled a meeting that afternoon with Jr. for McQuillan to discuss such a "sale." Jr. informed McQuillan at that meeting that she would either come to an agreement with him or she would be "looking for work."

In June 1982, S.I. announced that Intermark would be the new national distributor for the "box shoe trade;" shoe stores that carry a variety of shoes as opposed to simply athletic shoes. Heinsohn testified that the box shoe trade had been part of McQuillan's market.

In late summer or fall of 1982, Heinsohn became aware for the first time that S.I. had involved Dr. Kent Vasko of Sterivet, Inc. in the horseshoe pad project. At the conclusion of a distributor's meeting in the fall of 1982, Sr. casually informed McQuillan that ". . . we have appointed Sterivet as the national equestrian distributor, and you are no longer involved in equestrian products."

In November, 1982, Sr. presented his "last agreement" for an athletic distributorship with Sorboturf. This one, however, clearly permitted termination without cause. In response, McQuillan submitted her own contract that permitted termination only for cause.

In December 1982, Heinsohn, at Sr.'s direction, instructed Dr. Hiles and Forsyth to deliver test documentation and prototypes for the McQuillan horseshoe pad. In January 1983, S.I. began marketing the horseshoe pad. According to Dr. Hiles, the pad marketed by S.I. was indistinguishable from the pad he and McQuillan had developed.

Although unwilling to sign McQuillan's proposed contract for Sorboturf's athletic distributorship, S.I. did not sever the relationship and continued to treat Sorboturf as a distributor.

On August 1, 1983, with no previous warning or explanation, S.I. notified McQuillan in writing that S.I. "would no longer accept Sorboturf's orders." In August, 1983, McQuillan's father was also terminated as a

distributor without explanation, warning or justification. Less than one month later, Sorboturf's customers received notice that Jr.'s company was now the national distributor.

After receiving the August 1, 1983, letter from S.I., McQuillan contacted Dr. Hiles about the possibility of continuing her distributorship using British manufactured Sorbothane. However, Dr. Hiles informed her that Leyland, the other manufacturer of Sorbothane, was unwilling to sell in the United States. Having no alternative source of Sorbothane, McQuillan's distributorship was destroyed.

Birmingham and Leyland, although not restricted from making sales in the United States under its license agreement, had entered into an agreement with H-K that it would not sell in the United States and Canada and H-K, in turn, would not sell in Europe.

There are two groups of defendants/appellants/cross-appellees. They are:

(1) Sorbothane, Inc. [S.I.], Hamilton-Kent, Inc. [H-K], BTR, Inc. and Sr. [S.I. Group]; and

(2) Spectrum Sports, Inc. and Jr. [Spectrum Group].

DISCUSSION

THE SHERMAN ACT SECTION 1 CLAIM

McQuillan claimed an agreement between S.I. and its competitor, Leyland, to allocate the world market for Sorbothane products. The Courts treat horizontal market division agreements as per se violations of the Sherman Act. In *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608, 92 S.Ct. 1126, 1134 (1972). The Supreme Court said:

"It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act. . . . One of the classic examples of a per se violation of Section 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a 'horizontal' restraint, in contra-distinction to combinations of persons at different levels of the market structure, e.g. manufacturers and distributors, which are termed 'vertical' restraints. This court has reiterated time and time again that 'horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' [Citations omitted.] Such limitations are per se violations of the Sherman Act."

An action under Section 1 of the Sherman Act requires proof of a contract, combination, or conspiracy in restraint of trade. 15 U.S.C. Section 1. The essence of a Section 1 claim is concerted action. *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 525 (9th Cir. 1987). Heinsohn and Hiles testified that it was their understanding that there was an agreement by the two companies whereby Leyland would not export any Sorbo products into the United States and S.I. would not export products to Europe. Around October 1982 a United States company called Frelan U.S. was interested in obtaining Sorbothane products. Leyland informed Frelen U.S. that they would supply the materials or parts. This prompted a telex from Heinsohn on behalf of S.I. to Leyland informing them that "the import of finished Sorbo parts to a U.S. customer is in direct opposition to a harmonious marketing relationship between our two companies." This resulted in a telex

from a Leyland official to S.I. apologizing for any problems which may have been caused and asking that he be advised if we, Leyland, are guilty of any further infringements at any time.

S.I.'s argument is that Leyland and S.I. are sister corporations and they are incapable of conspiring under the holding of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772, 104 S.Ct. 2731, 2741-42 (1984). In *Copperweld* the Supreme Court held as a matter of law that a parent and its wholly-owned subsidiary are not distinct entities for the purpose of establishing the plurality requirement under a Section 1 claim. Since *Copperweld*, some circuits have held that not only wholly-owned subsidiaries and their parents are incapable of conspiring, but that sister subsidiaries are the same entity for purposes of an antitrust conspiracy under Section 1 and thereby do not satisfy the plurality element. The Ninth Circuit declined to reach this question as between sister corporations in *Wilcox v. First Interstate Bank of Oregon, N.A., supra.* S.I. contends that the Court should have directed a verdict or granted JNOV because the jury found that neither Spectrum nor Jr. conspired under the antitrust laws, therefore the only possible conspirators are Leyland and S.I. and they are incapable of conspiring as a matter of law under *Copperweld.*

The District Court denied the Motion for a Directed Verdict and JNOV. While the evidence did show that S.I. and Leyland were licensed by a BTR family member and that they are corporations existing under a family of companies controlled by BTR, PLC, a U.K. Holding Company, the evidence was to the effect that both corporations operated autonomously. This was true of all of the corporations that were in the BTR family. John

Cahill was a defense witness for S.I. He testified that there are about 650 units under the BTR family throughout the world. They are engaged in producing many different types of products and operate as independent units entirely autonomously. Hiles testified that some of the companies in the BTR family are strictly holding companies and some are operating companies. The operating companies operate as individual companies.

The Supreme Court has held that "common ownership and control does not liberate (two separately incorporated subsidiaries within the same corporate family) from the impact of the antitrust laws ... especially ... where (they) hold themselves out as competitors." *Keifer-Stewart Co. v. Joseph E. Seagrams and Sons, Inc.*, 340 U.S. 211, 215, 71 S.Ct. 259, 261 (1951). The Ninth Circuit has held that "to conspire within the meaning of the Sherman Act, corporate entities within a single organization must be sufficiently independent of each other for the concerted action to raise antitrust concerns ... to determine whether corporate entities are separate enough to be capable of a conspiracy, a Court must examine the particular facts of the case before it ... if the intra-enterprise entities hold themselves out as competitors, the rule that they can not avoid Sherman Act liability by hiding behind a common ownership and control is "especially applicable." *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979). The District Court gave an instruction along the lines of *Las Vegas Sun, Inc.* The jury made a factual determination against S.I. on this issue.

A Motion for JNOV focuses on the sufficiency of the evidence. The standard for granting a JNOV is the same as for a directed verdict. *Fountila v. Carter,* 571 F.2d

487, 489-90 (9th Cir. 1978). The Court considers "all of the evidence in the light most favorable to the non-moving party and draw(s) all reasonable inferences in favor of that party." *Twin City Fire Ins. v. Philadelphia Life Ins. Co.*, 795 F.2d 1417, 1423 (9th Cir. 1986). The Court properly denied S.I.'s Motions for JNOV and a Directed Verdict.

TESTIMONY OF McQUILLAN EXPERT

The District Court's evidentiary rulings will be upheld on appeal unless the Court abused its discretion, *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984), *cert. denied*, 469 U.S. 1165, 105 S.Ct. 926 (1985), or committed "manifest error." *United States v. Marabelles*, 724 F.2d 1374, 1381 (9th Cir. 1984). There is abuse of discretion if the lower Court decision is clearly erroneous or is based on incorrect legal standards. *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985). McQuillan elected to prove damages by showing a "loss of business value." The method of proving "loss of business value" was addressed by the Ninth Circuit in *Simpson v. Union Oil Company of California*, 411 F.2d 897 (9th Cir. 1969) as follows:

> "The issues should have been, what was the value of the business, what money did appellant have invested in it, what was its net income after deducting a fair return on capital and a fair compensation to appellant for his work, what were the prospects of continual renewals of the lease, and finally, if illegal restraints were removed, what were the prospects of additional profits from the business as it became better established. These are the factors that a willing buyer would consider in determining fair market value of the business . . ." 411 F.2d at 910.

James H. West, McQuillan's expert, testified as follows: He is a C.P.A., having been certified in 1952. He estimates that he has testified in Court as an expert on at least thirty occasions. He has experience in valuations of businesses since the early 1960's. This was in connection with valuing businesses being acquired or sold by clients, or on matters involving estate taxes in valuation of the business and estate plan, and after death valuations. He has also participated im matters involving disputes between parties on business-type valuations. He performed a valuation of Sorboturf Enterprises (McQuillan's business) as of the date of termination which was August 1, 1983. He explained that he considered sales for the period of existence of the business and made a forecast of sales for a future period. As he explained, in the case of a business that has a short history but has a growing trend in terms of its sales volume, it is usually necessary to utilize a forecast method to determine what the longer-term earnings would be in that, in evaluation, the buyer is essentially buying an income, buying a share of earnings. It is thus necessary to forecast the possible earnings in the future. He also considered expenses and costs, both past and the future. He determined a value for the athletic and equestrian distributorships. He then reached a total value for the business and reduced it to a present value. In valuing the business as of August 1, 1983, he did not consider information available after that date. He correctly stated that the valuation has to be based upon data that is available at the time of termination. S.I. and Spectrum argue that his method of valuation was inconsistent with the manner in which "loss of business value" must be proven and was without foundation and therefore speculative. The testimony of West had been admitted subject to a Motion to Strike. The Court denied the Motion to Strike.

Mr. West's testimony was not inconsistent with the formula set forth by the Ninth Circuit in *Simpson, supra.* Most of the objections of S.I. and Spectrum go to the weight of the testimony. The Court did not abuse its discretion or commit manifest error in admitting the testimony of Mr. West and denying the Motion to Strike.

MOTION IN LIMINE

The trial court granted a Motion in Limine by McQuillan and as a result S.I. and Spectrum were not permitted to introduce evidence of events occurring after August 1, 1983, as they related to the antitrust, RICO, and damage claims.

This ruling is appealed only by S.I., who maintains that post-termination evidence was relevant to show a lack of monopoly power, bears directly on the issue of specific intent to monopolize, and can also demonstrate the absence of injury in fact.

Evidentiary rulings are reviewed for abuse of discretion. The authorities cited by S.I. do not stand for the proposition that post-termination activity must always be admitted. The relevant time-period for demonstrated monopoly power is the period in which S.I. and Spectrum were engaging in the acts complained of by McQuillan, i.e. from the time she went into business until she was forced to close. The same is true of evidence of a declining marketshare in the relevant market and inability to exclude competitors. Evidence of the existence or non-existence of these elements after the termination date may be admissible depending on the circumstances of each case. It is important to note that the kind of damages which the plaintiff is claiming may effect whether or not such post-termination evidence is

admitted. S.I. cites *Greyhound Computer Corporation v. IBM Corp.,* 559 F.2d 488, 496, n. 18 (9th Cir. 1977) in support of admissibility of post-termination activity. In that case the plaintiff was suing for loss of business and future profits. Future profits would be affected by post-termination activity. McQuillan sued for the "loss of business value." The only material evidence relates to the value of her business at the time that she was terminated by the defendants.

S.I. also contends that the Court's ruling denied them the opportunity to prove that there was no "threat of continuing activity" as required by RICO. S.I. cites *Sedima v. Imrex, Inc.,* 473 U.S. 479, 105 S.Ct. 3275 (1985) as authority. In *Sedima* the Court said that there must be at least two acts and some evidence of a threat of continuing activity in order to find a pattern of racketeering activity. This language does not mean that post-termination activity is necessarily admissible in every case.

The trial court did not abuse its discretion in granting the Motion in Limine.

SHERMAN ACT—SECTION 2

(THE ATTEMPT TO MONOPOLIZE CLAIM)

The jury found against S.I. and Spectrum on the violation of Section 2 of the Sherman Act—monopolizing, attempting to monopolize, and conspiring to monopolize. The verdict form did not break down each of the claims, therefore, if the evidence is adequate to sustain any of the three theories, the verdict must be sustained. The Court instructed the jury that the plaintiff claimed that the defendants violated the Federal antitrust laws by monopolizing or attempting to monopolize the athletic

shoe market insert, the polymer athletic shoe insert submarket, or the Sorbothane athletic shoe insert market. The jury was instructed that in order to prove the claim of attempted monopoly, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. That the defendants had a specific intent to achieve monopoly power in the relevant market;

2. That the defendants engaged in exclusionary or restricted conduct in furtherance of its specific intent;

3. That there was a dangerous probability that defendants could sooner or later achieve its goal of monopoly power in the relevant market;

4. That the defendants' conduct occurred in or affected interstate commerce; and,

5. That the plaintiff was injured in the business or property by the defendants exclusionary or restrictive conduct.

Spectrum claims that the District Court erred in not directing a verdict or entering JNOV on the Sherman Section 2 claims because the evidence was legally insufficient to sustain the verdict. On the "attempt to monopolize" claim specifically, Spectrum argues that the record contains no evidence that Spectrum intended to destroy competition or that they committed any anti-competitive conduct directed towards that purpose.

Spectrum also contends that the Court erred in not directing a verdict or granting JNOV on the monopolization claims because there was no evidence that they had monopoly power, committed any predatory acts, or that any antitrust injury resulted from their conduct.

The Ninth Circuit, in a series of cases beginning with *Lessig v. Tidewater Oil Company*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), has held that sufficiently unfair or predatory conduct alone may satisfy both the specific intent and the dangerous probability elements of the offense, without any proof of relevant market or the defendant's marketpower. 327 F.2d at 474-75. Some of the opinions, including *Lessig*, dispensed with dangerous probability of success as an element of the offense since it may be inferred from proof of specific intent, which in turn may be inferred from conduct. In *Lessig*, Tidewater entered into a service station lease and dealer contract with Lessig and cancelled it later. The theory of Lessig's case was that Tidewater violated the antitrust laws by fixing the prices at which its dealers resold gasoline and by imposing upon its dealers a system of exclusive dealing and tieing arrangements in the purchase of petroleum products, tires, batteries, and automotive accessories which were sold or sponsored by Tidewater. The trial court withdrew from the jury the charge that Tidewater attempted to monopolize in violation of Section 2 of the Sherman Act. In reversing the trial court the court said:

> "The essence of monopoly is power to control prices and exclude competition and what we have said demonstrates that there was evidence that Tidewater possessed the specific intent to acquire and exercise such power with respect to a part of commerce.
>
> Tidewater argues that attempt to monopolize is established only if there is proof of 'dangerous probability of success, i.e., that if unchecked, monopolization will result'; that this requires an evaluation of Tidewater's power in the relevant

market; that the evidence on this issue was inadequate, and such evidence as there was indicated a lack of any possibility that Tidewater could monopolize the sale of petroleum products or tires, batteries, and automotive accessories. (TBA)

We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probabilty the statute requires—perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective.

> When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not an issue.' (Citations omitted) Section 2 prohibits attempts to monopolize 'any part' of commerce, and a dominant position in the business of distributing petroleum products and TBA was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products. If the jury found that Tidewater intended to fix the price at which 2,700 independent service station operators resold gasoline and to exclude other suppliers of petroleum products and sponsored TBA items from competing for the patronage of those operators, and took steps to accomplish that purpose, it could properly conclude that Tidewater attempted to monopolize a part of interstate commerce in violation of Section 2 of the Sherman Act." *Id.*

Later cases in the Ninth Circuit have followed *Lessig* and refined its language. In *California Computer Products, Inc. v. International Business Machines, Corp.*,

613 F.2d 727, 737 (9th Cir. 1979), the court said that evidence of marketpower is not an "independent" element of an attempt claim, citing *Hallmark Industry v. Reynolds Metals Co.*, 499 F.2d 8, 12, n.3 (9th Cir. 1973). In *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 669-70 (9th Cir. 1980) the court recognized that while evidence of marketpower is not vital, it may be relevant to suggest the existence of specific intent. It stated: "The real issue in this type of case is one of specific intent to monopolize, and we find nothing in *Lessig* which excludes consideration of marketpower as one of the circumstances to be considered in determining whether such intent exists."

We are satisfied that if evidence of unfair or predatory conduct is presented, it may satisfy both the specific intent and dangerous probability elements of the offense, without any proof of relevant market or the defendant's marketpower. If there is not sufficient evidence of unfair or predatory conduct, then the plaintiff will be required to show proof of relevant market or the defendant's marketpower. In *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979), an action claiming attempt to monopolize was brought against a retirement community newspaper that refused to accept carpet advertisements from dealers outside the retirement community. Over the plaintiff's insistence that proof of relevant market was unnecessary in their attempt claim, the Ninth Circuit held that "in the absence of proof of relevant market and marketpower, the plaintiff must prove either predatory conduct or a per se violation of Section 1 to prove an attempt to monopolize. . . .". 585 F.2d at 390.

The District Court instructed the jury that "if the plaintiff has shown that the defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of relevant market or the defendant's marketing power." There was no objection to this instruction.

The record shows that Spectrum, acting through Jr., engaged in the following conduct:

When McQuillan became interested in Sorbothane she spent a day at H-K. At this time Jr. was Vice President of Marketing for H-K. Jr. informed her that they, H-K, had not previously considered equestrian uses for Sorbothane. At this time McQuillan presented her ideas to Jr. and other H-K personnel concerning the making of horseshoe pads or equestrian products from Sorbothane. She was also introduced to Sr. on that trip.

Jr. left H-K and decided to become a distributor for Sorbothane. Up to this time he had been with H-K and was aware of McQuillan's efforts to develop an equestrian product. Jr., as Vice President of Marketing at H-K, had been involved in establishing the regional distributor concept and the selection of the individual distributors. There is evidence that Jr. was an enthusiastic enforcer of H-K's price fixing agreements. He boasted to Heinsohn that he had his own method of policing his retailers—he would slow down their shipments if they sold below a suggested retail list price. Jr. confided to Heinsohn that he wanted to be the national Sorbothane distributor from the beginning. He and Sr. were concerned that they would be criticized for violating BTR's anti-nepotism policy if Jr. were immediately given a national distributorship.

In January 1982 there was a meeting in Jr.'s office involving Sr., Jr., Heinsohn and John Burne. Burne, through his company IEM, marketed Sorbothane in England. He was interested in becoming the national Sorbothane medical distributor in the United States over the objections of Heinsohn, who felt the distributors had been promised the medical market. IEM was appointed national medical distributor of Sorbothane products. In order to have effective control of resale prices, it would be important to have only one person to deal with on athletic products. The result of a January 1982 meeting was an agreement that Jr. would be H-K's new national athletic distributor. In the meantime they had the problem of getting rid of the regional distributors. Jr. attempted to buy McQuillan's business and told her that if she did not agree to sell to him, she would be "looking for work." This was shortly after McQuillan was told that she would have to sell her athletic distributorship to Jr. in order to keep the equestrian distributorship rights. Sorbo, Inc., at Jr.'s direction, placed a hold on one of McQuillan's shipments of products. After her termination, Sr. gave Jr. McQuillan's customer list without consulting with her.

There is sufficient evidence from which the jury could conclude that the S.I. Group and Spectrum Group engaged in unfair or predatory conduct and thus inferred that they had the specific intent and the dangerous probability of success and, therefore, McQuillan did not have to prove relevant market or the defendant's marketing power.

The District Court should grant a Motion for Directed Verdict only if, considering all the evidence and all reasonable inferences that can be drawn from the evidence in a light most favorable to the non-moving

party, reasonable men could not arrive at a verdict in favor of the non-mover. Applying this standard, the trial court was correct in refusing to direct a verdict in defendants favor. There is sufficient evidence in the record to sustain the attempt to monopolize claim.

PROOF OF ANTITRUST INJURY TO ESTABLISH SECTION 2 CLAIM

S.I. and Spectrum complain that the jury instructions did not require McQuillan to prove an antitrust injury to establish the Section 2 claim. They also argue that the Court should have granted their Motion for JNOV because the plaintiff offered no evidence to prove that their conduct negatively effected competition. Horizontal market division agreements (Section 1 claim) and attempts to monopolize (Section 2 claim) are treated as per se violations of the Sherman Act. Injury to competition is presumed to follow from the conduct proscribed by these Sections. *United States v. Topco, supra; Walker v. U-Haul Co. of Mississippi,* 747 F.2d 1011 (5th Cir. 1984). The jury was properly instructed on the antitrust violations and there was sufficient evidence in the record to show that McQuillan was injured as a result of the defendants' conduct.

THE ALTER EGO INSTRUCTION

The jury found that H-K was the agent or alter ego of BTR, Inc. S.I. argues that the Court improperly instructed the jury regarding alter ego because it failed to properly explain that the absence of the corporate form causing the inequitable result must:

1. amount to bad faith;

2. be the product of the acts or omissions of the entity against whom liability is sought—here BTR; and,

3. proximately harm or prove to be unjust to McQuillan.

Orloff v. Allman, 819 F.2d 904 (9th Cir. 1987). S.I. also argues that the party against whom the alter ego doctrine is invoked must have been an actor in the course of conduct constituting the "abuse of the corporate privilege".

The jury instructions given by the Court were consistent with the cases cited by S.I. in support of its arguments.

The jury was instructed that a corporation is a separate legal entity. The jury was further instructed that the corporate form can be disregarded where:

> [T]here is such a unity of interest and ownership that the separate personalities of the parent corporation and the subsidiary no longer exist; and . . . an inequitable result would follow if the acts are treated as those of the subsidiary corporation alone.

The jury was specifically told to consider:

> One, whether the parent corporation is the principal stockholder of the subsidiary corporation; two, whether the parent corporation uses the subsidiary corporation as its marketing or distributing arm; three, whether the officers and directors of the two corporations are the same; four, whether the parent corporation holds the other corporation out to the public as a mere division or agent; five, whether the parent corporation has sufficient involvement with the day-to-day operation of the subsidiary corporation; six, whether the corporations have conducted separate board meetings and maintained separate minutes of board meetings; and whether an inequitable result will occur if the conduct is not attributable to both defendants.

Finally, the jury was cautioned:

> However, it is not sufficient in this regard for the plaintiff to show merely that the defendant BTR, Inc., owns all the stock in the defendant Sorbothane, Inc., and Hamilton Kent Manufacturing Company, or that the officers or directors of Sorbothane, Inc., and Hamilton Kent Manufacturing Company are the same as those of the defendant BTR. Factors which may be relevant in showing the domination or control include proof that there was a commingling of assets, that there was representations to the plaintiff that BTR, Inc. was liable for the debts of the defendants Sorbothane, Inc., and Hamilton Kent Manufacturing Company; that the defendant Sorbothane Inc., and Hamilton Kent Manufacturing Company used the same employees and facilities as the defendant BTR, Inc.; and that the defendant Sorbothane, Inc., and Hamilton Kent Manufacturing Company were mere shells or conduits for business which was fed directly to BTR, Inc.
>
> Each of these factors must be balanced and weighed by you to see if, in the totality of the evidence, the preponderance proves any lack of independent existence or control by the defendant Sorbothane, Inc., and Hamilton Kent Manufacturing.

These jury instructions were consistent with *Orloff, supra*, which states:

> The California alter ego doctrine ... applies where:
>
> (1) such a unity of interest and ownership exists that the personalities of the corporation and individual are no longer separate, and

> (2) an inequitable result will follow if the acts [giving rise to liability] are treated as those of the corporation alone.

819 F.2d at 908-09, citing *RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 545 (9th Cir. 1985) and *Automotriz Del Golfo De California, S.A. De C.V. v. Resnick*, 47 Cal.2d 792, 797, 306 P.2d 1, 4 (1957); *see also, Firstmark Capital Corp. v. Hempel Financial Corp.*, 859 F.2d 92, 94 (9th Cir. 1988).

S.I. argues that BTR must have been guilty of "wrongdoing" for the alter ego doctrine to apply. In *Firstmark*, this Court stated

> "A California Court of Appeal stated the [alter ego liability] rule thus, 'The fraud or inequity sought to be eliminated must be that of the party against whom the alter ego doctrine is invoked, and "such party must have been an actor in the course of conduct constituting the 'abuse of the corporate privilege' ...." ' *American Home Insurance Co. v. Travelers Indemnity Co.*, 122 Cal.App.3d 951, [966], 175 Cal.Rptr. 826, 834 (1981) (citations omitted)."

Firstmark Capital Corp. v. Hempel Financial Corp., supra, 859 F.2d at 94.

The jury instructions here were consistent with *Firstmark*. BTR, through Cahill, was an actor in the course of conduct constituting the abuse of the corporate privilege. *Firstmark* does not suggest that BTR had to have an evil motive or be independently liable for the wrongdoing. Indeed, alter ego liability is unnecessary if a party is independently liable.

S.I. contends that BTR merely engaged in the "normal supervisory actions" of a parent corporation. The jury, properly instructed on the relevant factors, resolved this factual issue against BTR and there was substantial evidence to support their conclusion.

ATTORNEYS FEES

The parties agree that the standard of review is abuse of discretion or clear error of law. What constitutes an appropriate award of attorneys fees and any enhancement thereof for payment delay or risk of non-payment are matters within the trial court's discretion.

The trial court denied McQuillan's request for fee enhancement based on delay and risk of non-payment and also rejected a portion of the alleged lodestar. McQuillan appeals only from the denial of enhancement. McQuillan sought enhancements totalling $574,042.00 for the delay in payment and for the risk of non-payment.

McQuillan argues that *Missouri v. Jenkins by Agyei*, _____ U.S. _____, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) holds that reasonable attorneys fees, in cases involving contingent fee agreements, *must* include compensation for delay in payment and may include enhancement for the risk of non-payment. This is an incorrect statement of the holding in that case and counsel conceded as much in oral argument. The Court held that an enhancement for delay in payment is "an appropriate factor in the determination of what constitutes a reasonable attorney's fee . . ." 109 S.Ct. at 2469. It did not hold that it was mandatory.

The District Court pointed out that the Court in *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) noted the "strong presumption" that the lodestar amount represents a reasonable fee, and that enhancements are to be given only in "rare" or "exceptional" circumstances. As pointed out by S.I. and

Spectrum, the trial court gave a "de facto" enhancement by utilizing the "average" hourly rate advanced by McQuillan in support of the fee application. This "average" was in fact a weighted mean calculated by dividing the total billed by the total hours. This adopted a higher billing rate set at current rates which is one of the common methods of enhancement for delay. *Jenkins*, 109 S.Ct. at 2469.

The Court explained its reasoning in denying enhancement and its decision is affirmed. There was no abuse of discretion.

THE DAMAGE AWARD

The jury returned the same damage award, $1,743,000.00, against all defendants on each Count on which they were found liable. Spectrum and Jr. argue that they were not found liable on some of the claims and certain claims were not even asserted against them, therefore, the Court erred in not granting a new trial due to the inconsistent damage awards. S.I. puts forth the same argument adding that there was obvious jury confusion and misunderstanding, thereby requiring a new trial.

The Seventh Amendment right to a jury trial requires validation of verdicts if at all possible. *Pierce v. Southern Pacific Transportation Company*, 823 F.2d 1366, 1370 (9th Cir. 1987). The Court has the duty to reconcile the jury's special verdict responses on any reasonable theory consistent with the evidence. *Pierce, supra*, at 1370, *Ortiz v. Bank of America National Trust and Savings*, 852 F.2d 383 (9th Cir. 1988), *In Re Hawaii Federal Asbestos Cases*, 871 F.2d 891, 894 (9th Cir. 1989), citing *Gallick v. Baltimore & O. R.R.*, 83 S.Ct. 659, 666-67, 372 U.S. 108, 119-22 (1963). The verdict against

S.I. Group on the Sherman Act Section 1 claim is supported by the evidence as has been set forth hereinbefore. The verdict against S.I. Group and Spectrum Group on the attempt to monopolize claim is also supported by the evidence. The Court need not address the arguments that the damages awarded on the other verdicts are not supported by the evidence.

OTHER ISSUES RAISED BY S.I. GROUP AND SPECTRUM GROUP

S.I. Group and Spectrum Group raise many other issues relating to the pendent state claims and the RICO claims. In view of the foregoing, it is not necessary for the Court to address any of those issues.

AFFIRMED.

JUDGMENT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

(Filed August 10, 1988;
Entered August 12, 1988)

Case No. 84-1585-E(CM)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SHIRLEY McQUILLAN and LARRY McQUILLAN, individually and dba SORBOTURF ENTERPRISES,
Plaintiffs,

vs.

SORBOTHANE, INC. (aka SORBO, INC.), HAMILTON-KENT MANUFACTURING COMPANY, INC., BTR, INC., SPECTRUM SPORTS, INC., KENNETH M. LEIGHTON and KENNETH B. LEIGHTON, JR.,
Defendants.

JUDGMENT

This action came on regularly for trial before the Court and a jury, the Honorable William B. Enright, District Judge, presiding, and the Court having instructed the jury to find a special verdict, and the jury having found such verdict,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Judgment shall enter for plaintiffs SHIRLEY and LARRY McQUILLAN, individually and dba SORBOTURF ENTERPRISES, and against defendants BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC., SORBOTHANE, INC. (aka SORBO, INC.) and KENNETH M. LEIGHTON on the claims for fraud, breach of an oral contract, bad faith denial of the existence of an oral contract, violation of section 17200 of the California Business and Professions Code—unfair competition, interference with prospective business advantage, conversion, violation of section 1 of the Sherman Act, Title 15 U.S. Code, violation of section 2 of the Sherman Act, Title 15 U.S. Code, violation of section 16600 or 16700 of the California Business and Professions Code—Cartwright Act, and violation of section 1962(a), (b), (c) and (d), Title 18 U.S. Code—the Racketeering Act;

2. Judgment shall enter for the plaintiffs SHIRLEY and LARRY McQUILLLAN, individually and dba SORBOTURF ENTERPRISES, and against defendants SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON on the claims for violation of section 17200 of the California Business and Professions Code—unfair competition, interference with prospective business advantage, violation of section 2 of the Sherman Act, Title 15 U.S. Code, and violation of section 1962(b), (c) and (d), Title 18 U.S. Code—the Racketeering Act; and

3. Judgment shall enter for defendants SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON and against plaintiffs SHIRLEY and LARRY McQUILLAN, individually and dba SORBOTURF ENTERPRISES, on the claims for fraud, violation of section 1 of the Sherman Act, Title 15 U.S. Code, violation of section 16600 or 16700 of the

California Business and Professions Code—the Cartwright Act, and violation of section 1962(a), Title 18 U.S. Code—the Racketeering Act;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs SHIRLEY and LARRY McQUILLAN, individually and dba SORBOTURF ENTERPRISES, have and recover from defendants BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC., SORBOTHANE, INC. (aka SORBO, INC.), SPECTRUM SPORTS, INC., KENNETH M. LEIGHTON and KENNETH B. LEIGHTON, jointly and severally, the sum of One Million Seven Hundred and Forty-Three Thousand Dollars ($1,743,000), said sum to be trebled to the sum of Five Million Two Hundred Twenty-Nine Thousand Dollars ($5,229,000), together with _____ Dollars ($—0—), as prejudgment interest, together with _____ Dollars ($912,032.50) as attorneys' fees, together with _____ Dollars ($32,828.83) as all costs of suit herein, together with interest on all such sums at a rate of 7.95 percent (% 7.95) per annum from the date hereof.

DATED: 8/9, 1988

/s/ WILLIAM B. ENRIGHT
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AMENDING MEMORANDUM DECISION AND DENYING PETITION FOR REHEARING

(Filed April 1, 1991)

No. 89-55326
89-55329
89-55332
(Consolidated)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHIRLEY McQUILLAN, *et al.*,
Plaintiffs/Appellees/
Cross-Appellants,

vs.

SORBOTHANE, INC., *et al.*,
Defendants/Appellants/
Cross-Appellees.

ORDER

BEFORE: TANG and O'SCANNLAIN, *Circuit Judges,* and MARQUEZ, *District Judge**

The panel has voted to amend its July 3, 1990 Memorandum Decison as follows:

---

* Honorable Alfredo C. Marquez, United States District Judge for the District of Arizona, sitting by designation.

At page 22, the final sentence of the first full paragraph reading: "There was no objection to this instruction." shall be deleted.

With the Memorandum Decision so amended, the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

(2)

No. 91-10

In The

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC.
and KENNETH B. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does a distributor, terminated pursuant to a *per se* unlawful conspiracy to replace all regional distributors with one national distributor, who has agreed to abide by a price fixing agreement, suffer antitrust injury?

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Two petitions for writ of certiorari were filed in this proceeding. The first, by defendants Sorbothane, Inc. ("SI"), Hamilton-Kent Manufacturing Company ("H-K") and Kenneth M. Leighton ("Leighton Senior") (the "SI Petition") raises three issues: (1) whether a verdict of attempt to monopolize under Section Two of the Sherman Act should be sustained where the jury was permitted to infer specific intent and dangerous probability of success under *Lessig v. Tidewater Oil Col.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), but also adjudged defendants liable for monopolization, thereby independently finding actual monopoly power; (2) whether on this record there was concerted activity to support the horizontal market allocation claim under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); and (3) whether defendants were entitled to a jury instruction on antitrust injury. Respondents address each of these issues in their opposition to the SI Petition.

The second petition, by defendants Spectrum Sports, Inc. ("Spectrum") and Kenneth B. Leighton ("Leighton Junior") (the "Spectrum Petition") raises only the *Lessig* and antitrust injury issues. The arguments raised in the Spectrum Petition as to the *Lessig* doctrine are substantially similar to those made in the SI Petition. Petitioners added in their *Lessig* discussion only the absurd argument that since Leighton Junior and Spectrum were not found liable for price fixing under Section One, the substantial evidence of their active participation in the price fixing scheme (Petitioners' Appendix, p. A20-21) was not

sufficient evidence of predatory conduct to support the *Lessig* inference of specific intent and dangerous probability of success. First, the *Lessig* inference was unnecessary, since the jury concluded that Leighton Junior and Spectrum monopolized the Sorbothane market, thus finding specific intent and actual monopoly power. Secondly, even under *Lessig*, there is no authority for the proposition that a defendant must have been found liable under Section One to have engaged in conduct "sufficiently predatory" to support a *Lessig* inference. (Such a rule would render the *Lessig* inference meaningless, since plaintiff will already be entitled to treble damages under Section One.)

Otherwise, the discussion of *Lessig* in the Spectrum Petition is the same as the SI Petition. In the interest of economy, respondents therefore respectfully refer the Court to the following portions of their opposition to the SI Petition (Docket No. 91-32): Introduction; Statement of the Case; Reasons for Denying the Petition, part A, (Standards of Rule 10); and Part B (The *Lessig* Inference was Unnecessary to the Verdict).

The discussion of antitrust injury in the Spectrum Petition varies sufficiently from the SI Petition to warrant specific rebuttal. In this opposition, respondents will therefore discuss only the issue of antitrust injury.

REASONS FOR DENYING THE PETITION

McQuillan Established Antitrust Injury as a Matter of Law.

Petitioners make two arguments as to antitrust injury, both of which can be dealt with summarily. Petitioners first attack the following language of the Ninth Circuit's opinion (affirming the District Court's finding of antitrust injury):

> Horizontal market division agreements (Section 1 claim) and attempts to monopolize (Section 2 claim) are treated as *per se* violations of the Sherman Act. Injury to competition is presumed to follow from the conduct prescribed by these sections.

Petitioners' Appendix, p. A22. The issue before this Court, however, is not whether each sentence of the Ninth Circuit's unpublished memorandum decision can be defended when presented out of context, but whether that court correctly affirmed the District Court's denial of petitioners' motion for JNOV on the issue of antitrust injury. There was no error.

Petitioners argue that the decision here is somehow inconsistent with *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S.Ct. 1184 (1990). *Atlantic Richfield* held that *per se* conduct does not presumptively result in antitrust injury to any particular plaintiff. *Atlantic Richfield's* only significance is its elimination of a presumption that, given the evidence in this case, is superfluous. McQuillan proved antitrust injury as a matter of law. She claimed and proved a single injury: The destruction of her business by the concerted refusal to sell her Sorbothane. This boycott facilitated petitioners' *per se* unlawful scheme to control

Sorbothane prices. McQuillan was the direct and foreseeable target of the conspiracy to maintain resale Sorbothane prices by terminating regional distributors and installing one national distributor. That national distributor was Leighton Junior, "an enthusiastic enforcer of H-K's price fixing agreement" (Petitioners' Appendix, p. A20). When a manufacturer, acting in concert with some of its distributors, eliminates another distributor in furtherance of a scheme to control prices, the resulting injury to the terminated distributor is antitrust injury as a matter of law. *United States v. General Motors Corporation*, 384 U.S. 127 (1966). *See also, Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982) ("where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause' ").

Petitioners' second argument is premised wholly on a misrepresentation of the record. Petitioners mislabel this a "distributor substitution" case, and then discuss inapplicable case law holding that where the only allegation is that one exclusive distributor is substituted for another, there will often be a minimal impact on competition. Petitioners then conclude that "if competition is unlikely to be affected when one exclusive distributor is replaced by another – one type of vertical restraint – then certainly the replaced distributor cannot suffer the type of damage the antitrust laws were designed to protect against [i.e., antitrust injury]." (Petition, p. 19.)

This is not, however, a "distributor substitution" case. One exclusive distributor was not merely replaced with another. Instead, defendants replaced all of the

regional distributors collectively with one national distributor so as to control Sorbothane prices in both the athletic and medical markets. This therefore is not the situation presented in *A.H. Cox & Co. v. Starr Machinery Co.*, 653 F.2d 1302, 1307 (9th Cir. 1981), where one distributor was replaced with another, without "any evidence of anticompetitive effect or intent." Here, there was ample evidence of petitioners' participation in the *per se* unlawful price fixing conspiracy. (See, Petitioners' Appendix, pp. A20-A21.) Petitioners were also found to have monopolized the Sorbothane market under Section Two, elements of which were specific intent and monopoly power (i.e., the most severe form of injury to competition).

CONCLUSION

Petitioners have not raised an issue that merits a grant of certiorari by this Court. Accordingly, this Court should deny the Petition for Writ of Certiorari.

DATED: July 25, 1991

Respectfully submitted,

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Attorneys for Respondents Shirley McQuillan and Larry McQuillan, d/b/a Sorboturf Enterprises

Supreme Court, U.S.
FILED
AUG 5 1991
OFFICE OF THE CLERK

No. 91-10

IN THE

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON,
Petitioners,

vs.

SHIRLEY MCQUILLAN and LARRY MCQUILLAN
dba SORBOTURF ENTERPRISES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI 1

TABLE OF AUTHORITIES

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. _____, 110 Sup. Ct. 1884 (1990) 2

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988)..... 3

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)..... 3

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) 2

No. 91-10

IN THE

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC. and
KENNETH B. LEIGHTON,
Petitioners,

vs.

SHIRLEY MCQUILLAN and LARRY MCQUILLAN
dba SORBOTURF ENTERPRISES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

This Court can decide three issues of national importance by granting this Petition. First, it can resolve the long-standing conflict between the Ninth Circuit and the other Circuit Courts of Appeals concerning the elements of an attempt to monopolize claim. Second, this Court can make clear that it will not condone the Ninth

Circuit's disregard of this Court's "antitrust injury" requirement, most recently addressed in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. _____, 110 Sup. Ct. 1884 (1990). Finally, this Court can make antitrust law better reflect economic reality by determining, as a matter of law, that "antitrust injury" cannot result from a manufacturer's substitution of its distributors.

Respondents do not dispute that the Ninth Circuit's odd rule in attempt cases, first announced in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), has been soundly and continually criticized by judges and academic commentators alike. Nor do Respondents dispute that in the decision below, the Ninth Circuit ignored this Court's holding in *Atlantic Richfield* to the effect that antitrust injury cannot be presumed. Finally, Respondents do not oppose Petitioners' argument that a manufacturer's substitution of one distributor for another does not negatively affect competition. Instead, Respondents misstate the Ninth Circuit's opinion and try to minimize its effect.

Respondents argue that this Court should not grant the Petition on the basis of the *Lessig* rule because, irrespective of *Lessig's* flaws, the attempt to monopolize claim was not dispositive of the case. Quite to the contrary, the *Lessig* rule served as the only basis to affirm the judgment against Petitioners. Appendix, A28.

Respondents also try to minimize the impact of the Ninth Circuit's decision because it was unpublished. Such an argument might be persuasive were the *Lessig* rule an issue of first impression. But *Lessig* has caused great consternation for more than 25 years, and its impact will continue until this Court sets it aside.

Finally, Respondents' dispute Petitioners' description of this action as a "distributor substitution case" and claim falsely that it is instead a price fixing scheme, a plan to horizontally allocate markets, and a concerted refusal to sell. However, Respondents neither asserted nor proved horizontal market allocation or concerted refusal to sell against Petitioners, and the jury rejected Respondent's price fixing claim. This case is nothing more than a garden variety distributor substitution case that should not be caught in the net of the antitrust laws.

The Ninth Circuit affirmed the trial court judgment, solely on the basis of the *Lessig* rule. This Court should grant this Petition and make clear that one may not prevail in an attempt to monopolize claim without proving a dangerous probability that competition will be harmed.

This Court has recognized that non-price vertical restraints do not automatically harm competition. *See, e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). This Court should now make clear that simple distributor substitutions, one type of vertical restraint, do not harm competition.

Respectfully submitted,

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Respondents.

SORBOTHANE, INC., ET AL.,

Petitioners,

v.

SHIRLEY McQUILLAN, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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14

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. THIS COURT SHOULD NOT REVERSE OR REMAND TO CORRECT TECHNICAL ERRORS IN THE UNPUBLISHED NINTH CIRCUIT OPINION 2

III. A PARTIAL SUMMARY REVERSAL BASED ON *COPPERWELD* WOULD HAVE NO EFFECT ON THE DISPOSITION OF THIS CASE 3

IV. NO PURPOSE WOULD BE SERVED BY A REMAND OF THIS CASE TO THE NINTH CIRCUIT FOR ANOTHER RECONSIDERATION OF *ATLANTIC RICHFIELD* 7

V. THE BRIEF OF THE UNITED STATES CORRECTLY CONCLUDES THAT THE ALLEGED *LESSIG* ERROR JUSTIFIES NEITHER REMAND FOR REVERSAL 10

VI. CONCLUSION 10

TABLE OF AUTHORITIES

Page

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 1, 2, 7, 8, 9, 10

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 1, 2, 3, 4, 5, 10

Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864 (9th Cir. 1991) 9

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.) cert. denied, 377 U.S. 993 (1964) 2, 10

Oahu Gas Service, Inc. v. Pacific Resources, Inc. 838 F.2d 360 (9th Cir.), cert. denied, 488 U.S. 870 (1988) 10

Respondents Larry and Shirley McQuillan file this brief in response to the brief of the United States as Amicus Curiae.

I

INTRODUCTION

Respondents agree with the conclusion of Amicus Curiae that this Court should not grant certiorari of the unpublished decision of the Ninth Circuit. However, in addition to recommending against a grant of certiorari, Amicus Curiae invites this Court to consider granting either a partial reversal on the *Copperweld* issue or remand for the Ninth Circuit Court of Appeals to again reconsider its decision in light of *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). The United States' suggestions, particularly when considered in light of its discussion at pages 12 through 17 of its brief, seem lukewarm and provide no explanation of how further review by the Ninth Circuit will serve any purpose. Respondents suggest that the United States' brief itself establishes why this Court should simply deny certiorari and allow this litigation to finally conclude nearly eight years after the complaint was filed. Respondents also believe that certain critical points are either unclear from the brief of the United States or are omitted entirely. Therefore, Respondents file this brief to make or clarify these critical points.

The United States also criticizes the Ninth Circuit's *Lessig* instruction but seems to acknowledge that no purpose would be served by a remand to the Ninth Circuit for further review on this issue. The *Lessig* rule has been

part of Ninth Circuit antitrust jurisprudence since 1964. This Court has declined several recent opportunities to review this doctrine in published cases. In any event, as the United States correctly points out, reversal on this issue would not affect the outcome since the Sorbothane petitioners were also found liable on two Section 1 counts and as to both petitions, there was evidence to support alternate Section 2 counts not based on the *Lessig* presumption. (Amicus Curiae brief at p. 16.) The treble damage award is supportable on any of these alternate Sherman Act claims as well as the multiple RICO counts that are not the subject of either petition.

II

THIS COURT SHOULD NOT REVERSE OR REMAND TO CORRECT TECHNICAL ERRORS IN THE UNPUBLISHED NINTH CIRCUIT OPINION

The Ninth Circuit issued a Memorandum Decision which has no impact on anyone other than the parties. It bears emphasis that Respondents prevailed on each and every antitrust claim as well as all RICO and state law claims. As discussed below, neither the correction of alleged *Copperweld* error nor the failure of the Ninth Circuit to specifically mention *Atlantic Richfield* will change the outcome of this case. No purpose is served by further delaying this case so the Ninth Circuit can, once again, consider the arguments raised by petitioners and possibly "clean up" its opinion.

III

A PARTIAL SUMMARY REVERSAL BASED ON *COPPERWELD* WOULD HAVE NO EFFECT ON THE DISPOSITION OF THIS CASE

The United States concludes the District Court erred, under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), by instructing the jury that subsidiaries of a common parent are capable of conspiring. However, the United States also recognizes that Petitioners presented *no evidence* on the relationship between the purported affiliated entities that engaged in the horizontal market allocation, including whether they were owned by a common parent. (Amicus Curiae brief at p. 13-14.) This Court should not vacate the decision and reverse based on an erroneous *Copperweld* instruction where the evidence would not have supported petitioners request for any instruction on the *Copperweld* defense.

More importantly, a remand to correct this error would not change the outcome. There were two separate Section 1 verdicts, for horizontal market allocation and resale price maintenance. While the United States suggests "it is difficult to determine whether the *Copperweld* error infected the Jury's verdict on the resale price fixing claim," (Amicus Curiae brief at p. 14, n. 11) in fact, the record is clear that the resale price fixing verdict was based on a finding of agreements that necessarily included non-affiliated corporations. For two independent and sufficient reasons, any error in the *Copperweld* instruction could not have affected, whatsoever, the jury's consideration of the resale price fixing claim.

First, the *Copperweld* instruction itself prevented the jury from finding an agreement exclusively between members of the BTR, Inc. family of corporations as the requisite Section 1 contract, combination or conspiracy. The corporate defendants found liable on the resale price maintenance claim were Hamilton Kent (the original Sorbothane manufacturing subsidiary of BTR, Inc.) and Sorbothane, Inc. (the subsidiary later created by BTR, Inc. to take over the manufacture of Sorbothane from Hamilton Kent.)[1] Both were entirely owned ultimately by BTR, Inc., which was found liable for resale price maintenance as the alter ego of Hamilton Kent and Sorbothane, Inc. BTR, Inc. was never a manufacturer of Sorbothane and neither Sorbothane, Inc. nor Hamilton Kent was ever a distributor to BTR, Inc.

The *Copperweld* conspiracy instruction provided:

> "A conspiracy cannot be found to exist between a corporation and its own agents and/or employees, nor can a conspiracy exist between a corporation and its unincorporated divisions or *its wholly-owned subsidiaries*. Conspiracy may be found to exist, however, between a corporation and other persons or independent corporations." (Emphasis added).

The instruction then explains the circumstances under which a conspiracy may exist in other affiliated corporation situations and it is the balance of the instruction with

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[1] Hamilton Kent, Inc. a multi-product rubber extruding manufacturer, was the original manufacturer of Sorbothane in the United States. Because of the success of the product, BTR formed a stand-alone subsidiary to take over that line of business from Hamilton Kent.

which petitioners and the United States take issue. Yet in this case, the portion of the instruction set forth above negates any finding of a conspiracy exclusively between the affiliated defendants found liable for resale price maintenance. The jury was properly instructed that a parent may not conspire with its wholly owned subsidiaries. Thus, the verdict could not have been based on an agreement between BTR, Inc. and either Sorbothane, Inc. or Hamilton Kent, Inc. The verdict also could not have been based on an agreement between these two subsidiaries. They were *successor manufacturers* of Sorbothane. At no time could they have conspired with one another to maintain resale prices and there was no suggestion or evidence that they did so. In short, the jury would have to have ignored this *Copperweld* instruction to have found resale price maintenance based on a conspiracy between these BTR related defendants.

Second, the resale price maintenance instruction provided, in pertinent part:

> "Plaintiff has charged the defendants with what is called resale price fixing. Resale price fixing is illegal under Section 1 of the Sherman Act and Cartwright Acts. *It is an Agreement between firms at different levels of a chain of distribution* to set the resale prices or price ranges for production.
>
> . . .
>
> In order to win on this claim, plaintiffs must prove each of the following by a preponderance of the evidence: first, *that the defendant entered into the agreement with another distributor of the defendants' or with the plaintiff, to fix resale prices. . . .* " (Emphasis added.)

R.T. at p. 4238-4239.

Since this instruction required the jury to find an agreement between two firms at different levels in the chain of distribution, *and* between a defendant and another distributor, it is impossible for the jury to have found resale price maintenance based solely on agreement between the affiliated BTR defendants *all of which were defendants at the same level of the distribution chain.*[2] Sorbothane and Hamilton Kent were manufacturers, and BTR Inc. simply was not in the chain of distribution. It was found liable as the alter ego *of these manufacturers.* The jury therefore necessarily premised its resale price fixing verdict on an agreement between a defendant and one or more unrelated third parties.

Thus, it was impossible for the jury to have properly followed the instructions, concluded that BTR, Inc. was the alter ego of Hamilton Kent and Sorbothane, Inc. and yet come to an incorrect conclusion on resale price maintenance as a result of any error in the *Copperweld* instruction. To have done so, the jury would have had to

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[2] Note that this instruction unnecessarily precluded the jury from finding an agreement *between defendants* as the resale price fixing agreement. This perhaps explains why Spectrum was exonerated despite overwhelming evidence that it participated in the resale price maintenance plan and was of course, a distributor at a different level in the distribution chain from the other defendants. It establishes, however, that the jury could not have possibly found the requisite agreement to have been between the BTR affiliated defendants alone. The jury must have concluded, as suggested by the United States in n. 11 of its brief, that the agreement was made between the defendants and one of the other distributors not named as a defendant in the complaint.

completely ignore both the *Copperweld* and the resale price maintenance instructions.

IV

NO PURPOSE WOULD BE SERVED BY A REMAND OF THIS CASE TO THE NINTH CIRCUIT FOR ANOTHER RECONSIDERATION OF *ATLANTIC RICHFIELD*

The United States invites this Court to consider a remand to the Ninth Circuit for further review in light of the discussion of antitrust injury in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). Yet, the United States completely fails to comment on the fact that the only assignment of error on this issue is a *procedural* one – the failure to submit this issue of law to a jury. Petitioners never properly challenged whether respondents suffered antitrust injury, and the United States acknowledges that "respondents may well be correct in arguing that the evidence in this case justifies a finding of antitrust injury under the analysis of *Atlantic Richfield*" (Amicus Curiae brief at p. 17.)

Whatever academic discussion of antitrust injury could be undertaken in some other context, the antitrust issue in this case is the erroneous claim that antitrust injury is appropriate for a jury instruction. Antitrust injury is plainly a legal issue for the court, not a fact question for the jury. Although the brief of the United States does not address this point, it is fatal to Petitioners' argument before this Court. If, as the United States appears to concede, the evidence justifies a finding of

antitrust injury in this case, no purpose is served by further review of this issue.

The Petitions for Rehearing to the Ninth Circuit were apparently given careful consideration (as suggested by the modification of the original decision on a fairly technical point.) The first and most prominent argument in support of the Petitions for Rehearing was whether the original decision should be modified in light of *Atlantic Richfield*. After nine months under submission, the Ninth Circuit apparently concluded that this Court's discussion of antitrust injury in *Atlantic Richfield* did not require a modification of the opinion or change the result in the case. While the United States believes it would have been preferable for the Ninth Circuit to explain why it rejected the fallacious argument that *Atlantic Richfield* somehow required reversal, it is clear the Ninth Circuit did that analysis and reached the correct conclusion. Absolutely no purpose would be served by having the Ninth Circuit once again reconsider its opinion in light of *Atlantic Richfield*.

As the United States points out, there is nothing incorrect about the Ninth Circuit opinion as it relates to antitrust injury. The Ninth Circuit merely states the unassailable rule of law that *harm to competition* is presumed to flow from a per se violation. *It does not state that antitrust injury is presumed to flow from per se violations of the antitrust laws.*[3] Since there is nothing incorrect about

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[3] It is noteworthy that there is no suggestion in the Ninth Circuit decision that it relied on its overrruled decision in

(Continued on following page)

the Ninth Circuit opinion, and since the Ninth Circuit already reconsidered this issue for nine months, there is no justification for remanding this case for yet another reconsideration in light of *Atlantic Richfield*. This is particularly true since, as the United States points out, the Ninth Circuit has recently followed *Atlantic Richfield* in *Datagate, Inc. v. Hewett-Packard Co.*, 941 F.2d 864, 868 (9th Cir.1991).

All of these considerations dictate against remanding this case to the Ninth Circuit for any further proceedings in light of *Atlantic Richfield*. The United States' suggestion to the contrary apparently arises not out of any conviction that the District Court or Ninth Circuit erred in the

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(Continued from previous page)

Atlantic Richfield (which incorrectly concluded that a presumption of antitrust injury follows from per se unlawful conduct). The opinion is not cited anywhere in the Ninth Circuit decision. Any confusion in the Ninth Circuit discussion of antitrust injury results from the confusion in the way in which the issue was framed by petitioners in their briefs. Petitioners never properly raised any substantive challenge to the existence of antitrust injury. Sorbothane, Inc., in its answering and opening brief to the Ninth Circuit at p. 44 (lines 4-8) raised only the failure to give its requested instruction on antitrust injury. Spectrum's answering and opening brief, at pages 30-31, argues the absence of antitrust injury is demonstrated by a showing that the challenged conduct "cannot be determined to have had any effect on competition." The Ninth Circuit properly answered the contention by pointing out that *harm to competition* is presumed to follow from per se unlawful conduct. It never stated that *antitrust injury* is presumed to follow from per se unlawful conduct and did not, therefor, need to modify its decision.

antitrust injury analysis or that the result would be different; rather, the United States is bothered by the Ninth Circuit's failure to mention *Atlantic Richfield*. Remanding this case so the Ninth Circuit can add a citation to an unpublished decision would cause unnecessary delay and a waste of limited judicial resources.

V

THE BRIEF OF THE UNITED STATES CORRECTLY CONCLUDES THAT THE ALLEGED *LESSIG* ERROR JUSTIFIES NEITHER REMAND NOR REVERSAL

The United States concludes the *Lessig* doctrine of the Ninth Circuit is incorrect. The merits of that issue have already been fully briefed. More important to these Petitions for certiorari, however, is the United States' conclusion that a *Lessig* error does not justify any action by this Court. The United States points out that *Lessig* is not dispositive, that the importance of *Lessig* is diminished by the *Oahu Gas* case, and that this unpublished decision does not change the state of the law in the Ninth Circuit. It is clear that any alleged *Lessig* error does not justify any action by this Court.

VI

CONCLUSION

The Petitions for certiorari should be denied since no legitimate issue is raised by Petitioners. The assignment of error on the *Copperweld* instruction would not be dispositive of all the antitrust claims and the request for a jury instruction on the antitrust issue is simply specious.

It would be a futile and time consuming exercise to either partially reverse or to remand this case to the Ninth Circuit. No issue merits a grant of certiorari, no issue merits a reversal of any kind, and no issue merits a remand. This case has been pending for almost eight years with over two of those years spent in the Ninth Circuit. Respondents respectfully request that consideration be given to whether the interests of justice will be served by further proceedings below.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

REPLY BRIEF IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI 1

TABLE OF AUTHORITIES

Cases

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 2,3

Barber & Ross Co. v. Lifetime Doors, Inc., 810 F.2d 1276, 1280 n.2 (4th Cir.), *cert. denied*, 484 U.S. 823 (1987) 3

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) 2,3

Oahu Gas Service, Inc. v. Pacific Resources, Inc., 838 F.2d 360 (9th Cir.) *cert. denied*, 488 U.S. 87 (1988) 2,3

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REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Petitioners, Spectrum Sports, Inc. and Kenneth B. Leighton file this Reply to Petitioners' Response to the Brief of the United States.

REPLY

Respondents ask the Court to disregard the United States' suggestion that the Court summarily reverse the decision of the Ninth Circuit Court of Appeals. Respondents object to the Solicitor General's suggestion for four reasons:

> 1. Respondents claim the United States raises issues that are not "case dispositive".
>
> 2. Respondents argue that *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.) *cert. denied*, 488 U.S. 87 (1988) limits the impact of *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).
>
> 3. Respondents ask this Court to deny the Petition because this case has been pending for almost eight years.
>
> 4. Respondents' claim that even if this Court were to summarily reverse, the Ninth Circuit would probably reaffirm the trial court's judgment.

1. Summary reversal based either upon the Ninth Circuit's refusal to consider *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) or upon its continued allegiance to *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) disposes completely of Respondents' case against Petitioners. The Ninth Circuit affirmed the trial court judgment based only upon its mistaken belief that the "attempt to monopolize" judgment was correct. It declined to review any other issue. Were this Court to reverse on the "attempt to monopolize" issue, no other basis to affirm the trial court's judgment remains. Further, contrary to their assertion, Respondents did not prevail on all other claims presented at trial. They failed

on their Section 1 claims and on the fraud count underlying their RICO claim. Therefore, a reversal based upon either the *Lessig* issue or the *Atlantic Richfield* issue disposes entirely of the Ninth Circuit decision.

2. Respondents argue the importance of *Lessig* is diminished by *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988). However, in this case, the trial court, upon Respondent's objection, overruled Petitioners' request for an *Oahu Gas* instruction. R.T. 3915. As a result, Petitioners never had the benefit of a proper instruction that might have cured the ills inherent in *Lessig*.

3. Respondents' frequent complaint that this case has been pending for almost eight years misses the mark. This Court should not affirm an unjust, multi-million dollar judgment simply because of the age of the case. Mere aging cannot cure an error-ridden decision.

4. Respondents' claim summary judgment would be a hollow act because they believe the Ninth Circuit will reaffirm. To the contrary, vacating and remanding the Ninth Circuit's decision, as the United States suggests, will result in a new trial in which Petitioners may have the jury consider whether or not Respondents have proved antitrust injury. *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1280 n.2 (4th Cir.), *cert. denied*, 484 U.S. 823 (1987). Moreover, Respondents' position is belied by their opposition to the United States' suggestion. Were Respondents truly confident the Ninth Circuit would reaffirm, their quarrel with the United States would be unnecessary.

For these reasons, if the Court chooses not to grant plenary review of this petition, Petitioners request the Court to follow the suggestion of the United States and summarily reverse and remand this case to the Ninth Circuit.

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TABLE OF CONTENTS

		Page
I	THE DISTRICT COURT DID NOT COMMIT ERROR IN REFUSING TO INSTRUCT THE JURY ON ANTITRUST INJURY, WHICH IS A QUESTION OF LAW	1
II	THE NINTH CIRCUIT DID NOT ERR IN UPHOLDING THE JURY'S SECTION 1 VERDICT FOR RESALE PRICE MAINTENANCE	3
III	REVERSAL AND REMAND IS NOT APPROPRIATE ON THE *COPPERWELD* ISSUES	7
IV	REVERSAL AND REMAND IS NOT APPROPRIATE ON THE *LESSIG* PRESUMPTION	8
V	CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES:

Barber & Ross Co. v. Lifetime Doors, Inc., 810 F.2d 1276 (4th Cir.) *cert. denied*, 484 U.S. 823 (1987) 1

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 2

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 3, 6

Copperweld v. Independence Tube Corp., 467 U.S. 752 (1984) 7

Int'l Travel Arrangers v. NWA, Inc., 723 F.Supp. 141 (D.Minn. 1989) 1

Key Enterprises of Delaware, Inc. v. Venice Hosp., 919 F.2d 1550 (11th Cir. 1990)..... 1

R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102 (2nd Cir.) *cert. denied*, 493 U.S. 823 (1987)..... 1

RULES:

Supreme Court Rule 15.7 1

This brief is filed pursuant to Supreme Court Rule 15.7 to address issues raised in the Supplemental Brief of Petitioners in Support of Petition for Writ of Certiorari.

I

THE DISTRICT COURT DID NOT COMMIT ERROR IN REFUSING TO INSTRUCT THE JURY ON ANTITRUST INJURY, WHICH IS A QUESTION OF LAW.

The Sorbothane petitioners persist in arguing that the jury should have been instructed on antitrust injury, and for the first time purport to cite to authority for this proposition. None of the cited cases held that the trial court must, or even should instruct the jury as to the antitrust injury. In *Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 919 F.2d 1550, 1560 (11th Cir. 1990) and *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1280 n.2 (4th Cir.) *cert. denied*, 484 U.S. 823 (1987) the courts merely affirmed, based on consideration of the evidence, that the plaintiffs suffered antitrust injury. In *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 107 (2nd Cir.) *cert. denied*, 493 U.S. 823 (1987), the court affirmed that plaintiff met its burden in opposition to summary judgment to show a disputed issue of material fact as to antitrust injury. Similarly, in *Int'l Travel Arrangers v. NWA, Inc.*, 723 F.Supp. 141, 150 (D.Minn. 1989) the court held that plaintiffs had sufficiently alleged antitrust injury to avoid dismissal. Neither case discusses whether antitrust injury is a question of law, let alone whether the jury must be instructed as to antitrust injury.

Petitioners also cite to the 1985 Supplement to the 1980 edition of *Antitrust Civil Jury Instructions*, published

by the ABA Section of Antitrust Law. Respondents do not have these (superseded) instructions, but judging from petitioners' other citations, respondents have no confidence these are antitrust injury instructions. At trial, Petitioners agreed that standing and antitrust injury are questions of law (Pretrial Order, Defendants/Appellants E.R., p. 184) and then submitted a pattern instruction on proximate cause with a definition of antitrust injury added on.

Furthermore, the 1987 and 1990 editions of *Sample Jury Instructions in Civil Antitrust Cases* published by the ABA Section of Antitrust Law do not include antitrust injury instructions, and in the introduction state

> Certain areas of antitrust law are omitted because they involve only questions of law, or because the likelihood or frequency of jury issues is minimal. *For example, there are no instructions relating to standing to sue. . . .*

Id. at p. xix (1987 edition) and p. xx (1990 edition) (emphasis added). Antitrust injury is a legal issue subsumed within antitrust standing. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (competitor that has not suffered antitrust injury does not have standing under the antitrust laws). Therefore, the ABA Section on Antitrust has recognized, at least for the last five years, that the jury should not be instructed on antitrust injury.

II

THE NINTH CIRCUIT DID NOT ERR IN UPHOLDING THE JURY'S SECTION 1 VERDICT FOR RESALE PRICE MAINTENANCE.

Petitioners attack the resale price fixing verdict on the ground that under *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), respondents must show an agreement as to price levels between the manufacturer and the surviving distributors. While Petitioners did not raise this point in their Petition for Writ of Certiorari,[1] the agreement to fix prices and terminate price cutting distributors in this case fits squarely within the definition of per se unlawful vertical price fixing in *Sharp*.

There was substantial evidence that respondent Sorboturf was terminated pursuant to a specific agreement to maintain resale prices. The agreement between Sorbothane (the manufacturer) and the two surviving distributors was that each distributor would maintain resale prices, and in return Sorbothane, Inc. would terminate regional distributors. The two distributors who entered into this agreement with Sorbothane were petitioner Kenneth Leighton Jr., whose company Spectrum Sports became the exclusive national distributor to athletic retailers, and John Burne, whose company IEM became the exclusive distributor to medical retailers.[2] The

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[1] The petition discusses *Sharp* only in the context of whether respondents suffered antitrust injury. Petition for Writ of Certiorari, p. 19.

[2] While the regional distributors expressly agreed to fix prices, (R.T. p. 828, lines 1-13) Sorbothane was not satisfied

(Continued on following page)

so-called medical market was simply retailers who sold medical supplies. The same Sorbothane insole was repackaged for these retailers, and sold at twice the price of the athletic insole. (R.T., Vol. V, pp. 834, line 20 – 835 line 10.)

Petitioners do not challenge the sufficiency of the evidence of the agreement. Petitioners instead attempt to show that the verdict was inconsistent with a finding of conspiracy between Sorbothane and its new exclusive distributors. As to Spectrum Sports, petitioners again urge that since Spectrum Sports was not found liable on the vertical price fixing claim, the jury must have concluded that it did not agree to maintain resale prices. Respondents address this contention in their Response to the Brief For the United States as Amicus Curiae, at p. 6, n.2.

Petitioners claim that IEM "could not have been a Section 1 conspirator because it distributed medical products – products which were not functional substitutes for, and so were not competitive with, the athletic products sold by Respondents in the submarket as defined by Respondents and the District Court." That is nonsense.[3]

(Continued from previous page)

with their performance in maintaining retail prices. For example, respondent Sorboturf failed to police all of its retailers. (R.T. Vol II, p. 300, lines 2-6.) Spectrum Sports, on the other hand, was an enthusiastic price fixer. Leighton Jr. boasted to Sorbothane, Inc. of his techniques in enforcing retail list price. (R.T. Vol. V., p. 830, lines 13-25.)

[3] It is also untrue. The relevant market proposed by respondents included all Sorbothane shoe inserts. (Pretrial Order ¶ 141, Spectrum. E. R. p. 111.)

First, the relevant product market has nothing to do with the analysis of per se vertical price fixing. Respondents need only show they were terminated as part of an agreement to fix prices on a product or products.

Second, the purpose of the price fixing and dealer termination agreement in this case was to maintain resale prices in both the so-called "medical" and "athletic" markets. Before the agreement to terminate the regional distributors, respondents and the other regional distributors sold sorbothane insoles to athletic and medical retailers. (R.T. Vol. V, pp. 833 line 18 – 834 line B.)[4] IEM objected to this, since it interfered with John Burne's plan to charge double the athletic insert price to the medical market. (*Id.*) Therefore, under the agreement between Sorbothane, Inc., Spectrum Sports and IEM, the regional distributors were to be terminated, the surviving exclusive distributors would sell at different prices to these different retailers. Spectrum Sports agreed to maintain the price (in the newly separated athletic market) which the regional distributors had failed to maintain. IEM would maintain an even higher price to medical retailers.

John Burne endorsed the plan to have Spectrum Sports as the sole national distributor to athletic retailers because he knew that Leighton Jr. would enforce price agreements for the sale of the athletic insoles, and thus

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[4] The only difference between the two insoles was the color. (R.T. Vol. X, p. 1753, lines 17-21; pp. 1754, line 22 – 1755 line 9.)

minimize the price competition with the medical insoles. (*Id.* pp. 835 line 8 – 836 line 18.)[5]

Therefore, it is absurd for petitioners to now argue that IEM could not have been a Section 1 conspirator with Sorbothane, Inc. It was IEM's idea to call the meeting at which the agreement to terminate respondents and reinvigorate the price fixing plan was reached. (*Id.* p. 833 lines 16-25.) Respondents were terminated to enable IEM to charge higher fixed prices in the newly designated medical market. (*Id.* p. 834 lines 1-24.) In short, the agreement between petitioner (Sorbothane, Inc.), Spectrum Sports and IEM to terminate regional distributors and then maintain fixed prices was sufficient to support the vertical price fixing claim. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) ("a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels").[6]

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[5] As Ms. Heinsohn testified at trial, "A doctor could go down to a sporting goods store and buy a pair of insoles cheaper than getting it from John Burne." (R.T. Vol. V, p. 835 lines 8-10.) This was the problem the termination of regional distributors was intended to solve.

[6] If the Court has any concern whether respondents have satisfied the elements of *Sharp*, respondents urge the Court to review pages 823-843 of the Trial Transcript, wherein Ms. Heinsohn, the marketing manager for Sorbothane, Inc., describes the meeting she attended with John Burne and Leighton Jr. The Trial Transcript of this testimony is appended to this brief.

III

REVERSAL AND REMAND IS NOT APPROPRIATE ON THE *COPPERWELD* ISSUES

Respondents do not concede there was any error in the jury instructions under *Copperweld v. Independence Tube Corp.*, 467 U.S. 752 (1984). Respondents' discussion of the *Copperweld* issue in their response to the brief by the United States merely shows that even if there were error, remand on this issue would serve no purpose, since (1) there was no evidence entitling petitioners to a *Copperweld* defense, (2) the vertical price fixing verdict could not have been based on a conspiracy between the affiliated companies, and (3) there were multiple verdicts on section 2 and RICO claims, each of which would support the entire damage award.

Petitioners discussion of the *Copperweld* issues is limited to conclusions and curious citations. On the issue of whether there was evidence to support a *Copperweld* defense, petitioners refer to the Amicus Curiae brief at pp. 13-14. Yet the United States concludes that "the jury may have found a conspiracy because it did not believe that petitioners presented sufficient evidence of their affiliation." Moreover, apart from what the jury may have done, the record would not support a defense to either section 1 claim based on *Copperweld*.

Petitioners refer to Amicus Curiae brief, p. 14 n.11 on whether the vertical price fixing verdict was based on a conspiracy between affiliated companies. There, the United States acknowledges that the jury was instructed that it must find an agreement between firms at different levels of a chain of distribution, and thus the verdict

could be based (as it was) on an agreement between the Sorbothane petitioners and independent distributors. While the United States goes on to note (without explanation) that "the issue is further complicated" because IEM was a medical insole distributor, as is discussed above, the agreement to fix prices and terminate respondents was directly tied to price fixing agreements on sorbothane insoles sold to both medical and athletic retailers.

IV

REVERSAL AND REMAND IS NOT APPROPRIATE ON THE *LESSIG* PRESUMPTION.

On *Lessig*, petitioners reach the odd conclusion that "Respondents apparently agree that *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.) *cert. denied*, 377 U.S. 993 (1964) is not the law." *Lessig* is well-settled law in the Ninth Circuit. Respondents' point is that *if* this Court wishes to review the *Lessig* presumption, this is not the case to do it. If the Court agrees, further review by the Ninth Circuit will serve no purpose.

V

CONCLUSION

Respondents urge the Court to look beyond the conclusion of the United States that the Ninth Circuit's opinion is unclear or contains error in considering whether to summarily reverse and remand for another one to three years of review. The record before this Court amply demonstrates that further review would lead to the same

outcome between the parties and therefore serve no purpose. Respondents respectfully request that the Court consider the record, which demonstrates the jury was properly instructed, and the antitrust verdicts are supported by substantial evidence.

Respectfully submitted,

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APPENDIX

Portions of Trial Testimony of Laurene Heinsohn

MENT THAT WAS DONE FOR THE PROMOTION OF SORBOTHANE PRODUCTS?

A. THEY PAID SOME, YES.

Q. WHAT DID THEY PAY? WHAT DID HAMILTON KENT OR SORBOTHANE PAY FOR DURING THAT ENTIRE PERIOD?

A. THEY SUPPORTED THE SPORTING GOODS TRADE SHOWS, FOR EXAMPLE, SUPPORTING THE DEVELOPMENT OF THE BOOTH USED IN THAT TRADE SHOW; AND THEY DID HAVE AN ADVERTISING ALLOTMENT FOR OUR ADVERTISING BUDGET, WHATEVER THAT TOTAL WAS. THEY DID HAVE A PERCENT SHARE OF THE CONTRIBUTION IN THAT.

Q. DESCRIBE HOW THAT RELATED TO THE CONTRIBUTION OF THE REGIONAL DISTRIBUTORS, IF YOU CAN.

WAS THE CONTRIBUTION OF HAMILTON KENT INSIGNIFICANT IN RELATION TO WHAT THE REGIONAL DISTRIBUTORS WERE DOING FOR DIRECT ADVERTISING?

A. I DON'T KNOW IF "INSIGNIFICANT" IS THE RIGHT WORD. IT WAS NOT THE SAME RATIO, PER SE, AS FAR AS THE BENEFIT RECEIVED.

Q. NOW, AS THE MARKETING MANAGER OF THE SORBOTHANE DIVISION OF HAMILTON KENT, AS OF YEAR END, 1981, DID YOU FEEL, AS THE MARKETING MANAGER, THAT AN ORAL AGREEMENT HAD BEEN REACHED WITH SHIRLEY MC CONE REGARDING HER SERVICES AS DISTRIBUTOR?

MR. BOMSTER: OBJECTION.

THE COURT: SUSTAINED.

BY MR. SHOHET:

Q. I WOULD LIKE TO NOW ASK YOU, MS. HEINSOHN, A LITTLE BIT CONCERNING PRICING POLICY AT HAMILTON KENT AND SORBOTHANE.

[824]

DID YOU HAVE DISCUSSIONS WITH ANY OF THE DISTRIBUTORS CONCERNING AT WHAT PRICE, IF ANY, THEY WOULD BE PERMITTED TO RESELL SORBOTHANE PRODUCTS?

A. YES.

MR. BOMSTER: IF IT PLEASE THE COURT, MAY I HAVE A TIMEFRAME ON THIS, PLEASE?

THE COURT: I ASSUME HE WILL.

BY MR. SHOHET:

Q. DID YOU HAVE DISCUSSIONS WITH THEM SHORTLY AFTER THE DISCUSSIONS THAT YOU IDENTIFIED WHERE YOU SAID, "GO AHEAD AND BEGIN MARKETING"?

A. YES.

Q. SO THAT WOULD BE IN THE FALL TO WINTER, 1981?

A. YES.

Q. WHAT DID YOU TELL THEM WITH REGARD TO THE RESALE PRICE OF SORBOTHANE BY THE DISTRIBUTORS?

A. TO MAINTAIN THE RESALE PRICE.

THE COURT: WHAT WAS THAT TO BE, 50 PERCENT MARKUP, MA'AM?

THE WITNESS: YES.

BY MR. SHOHET:

Q. AND DID YOU HAVE DISCUSSIONS WITH KENNETH M. LEIGHTON CONCERNING YOUR DIRECTION TO THE DISTRIBUTORS TO HOLD THE RESALE PRICE AT A 50 PERCENT MARKUP?

A. YES.

[825]

Q. AND DID KENNETH M. LEIGHTON GIVE YOU ANY PARTICULAR DIRECTION WITH REGARD TO THAT SUBJECT? DID HE TELL YOU TO GO AHEAD AND TELL THE DISTRIBUTORS TO DO THAT?

MR. BOMSTER: OBJECTION.

THE COURT: NO. I WILL NOTE YOUR OBJECTION AND OVERRULE IT.

YOU CAN ANSWER IT NOW.

THE WITNESS: YES. MR. LEIGHTON, SR., TOLD ME TO MANAGE THE DISTRIBUTORS TO MAINTAIN THAT WHOLESALE PRICE.

Q. DID MR. LEIGHTON, DURING THE ENTIRE COURSE OF YOUR EMPLOYMENT AT HAMILTON KENT OR SORBOTHANE, INC., EVER TELL YOU TO CONTACT A DISTRIBUTOR BECAUSE THERE WAS DISCOUNTING GOING ON IN THAT DISTRIBUTOR'S TERRITORY?

A. YES.

Q. ON HOW MANY OCCASIONS DO YOU RECALL KENNETH M. LEIGHTON TELLING YOU TO CONTACT A DISTRIBUTOR AS A RESULT OF DISCOUNTING?

A. ONE SPECIFIC TIME THAT I REMEMBER.

Q. WHAT WERE THE CIRCUMSTANCES OF THAT SPECIFIC INSTANCE? DO YOU REMEMBER THE TIME?

A. YES. IN NOVEMBER OF 1981, MARTY VOGEL WAS SELLING BELOW WHAT WE HAD – BELOW WHAT WE HAD RECOMMENDED AS THE WHOLESALE PRICE.

Q. HOW DID YOU LEARN THAT HE WAS DOING THAT?

A. KEN LEIGHTON, JR., DISCOVERED IT AND NOTIFIED MYSELF AND

KEN LEIGHTON, SR.

Q. DID YOU DISCUSS THAT WITH KEN LEIGHTON, SR.?

A. YES.

Q. WHAT DID YOU DISCUSS? WHAT DID HE SAY AND WHAT DID YOU SAY?

A. HIS REQUEST TO ME WAS TO CALL MARTY AND TO ASK MARTY TO MAINTAIN THE PRICE THAT WE HAD ASKED HIM TO MAINTAIN.

Q. DID YOU DO SO?

A. YES.

Q. DID MR. VOGEL TELL YOU – WHAT DID MR. VOGEL SAY TO YOU WITH REGARD TO YOUR REQUEST THAT HE HOLD THE PRICE?

A. MR. VOGEL RESPONDED POSITIVELY.

Q. DID YOU HAVE DISCUSSIONS WITH OTHER DISTRIBUTORS REGARDING THEIR HOLDING THE RESALE PRICE?

A. YES.

Q. DID THE OTHER DISTRIBUTORS – DID MR. VOGEL AND THE OTHER DISTRIBUTORS AGREE TO HOLD THE RESALE PRICE OF SORBOTHANE IN THEIR TERRITORY?

MR. BOMSTER: OBJECTION.

MR. MAC ADAMS: FOUNDATION, YOUR HONOR.

THE COURT: I THINK WE ARE GETTING INTO SOME OTHER AREAS. IT SMACKS OF HEARSAY, SIR. I DON'T KNOW WHAT OTHER PURPOSE IT WOULD HAVE.

MR. SHOHET: SIMPLY TO ESTABLISH AN AGREEMENT; AND IT'S REALLY VERBAL CONDUCT.

THE COURT: HOW ARE YOU GOING TO DO THAT? ARE YOU GOING TO DO EACH INDIVIDUAL DISTRIBUTOR?

MR. SHOHET: I CAN DO THAT.

BY MR. SHOHET:

Q. MS. HEINSOHN, DID ANY OF THE DISTRIBUTORS EXPRESS A WILLINGNESS OR AGREEMENT TO HOLD THE RESALE PRICE OF SORBOTHANE?

MR. BOMSTER: OBJECTION, NO FOUNDATION.

THE COURT: LAY A FURTHER FOUNDATION.

BY MR. SHOHET:

Q. FIRST, IF YOU WOULD SAY WHAT OCCURRED, AND THEN I WOULD LIKE TO KNOW WHEN AND WHAT CIRCUMSTANCES.

A. YES, IT DID OCCUR.

Q. WITH WHICH DISTRIBUTORS DID YOU REACH AN AGREEMENT ON THEIR PART TO HOLD THE RESALE PRICE?

MR. MAC ADAMS: OBJECTION.

MR. VAIL: OBJECTION.

THE COURT: I WILL NOTE YOUR OBJECTION.

WAS THERE ANY DISSENT FROM THAT, MA'AM, ON HOLDING THE PRICE BY ANY DISTRIBUTORS?

THE WITNESS: YES.

THE COURT: OKAY. YOU MAY INQUIRE.

BY MR. SHOHET:

Q. WHICH OF THE DISTRIBUTORS DISAGREED OR WERE UNWILLING? WHICH, IF ANY, WERE UNWILLING TO HOLD THE PRICE?

A. R.H.R. AND SORBOTURF.

[828]

Q. DID MARTY VOGEL EXPRESS A WILLINGNESS TO HOLD THE RESALE PRICE?

A. YES.

Q. DID KENNETH B. LEIGHTON?

A. YES.

Q. DID ARNIE LUND EXPRESS A WILLINGNESS TO DO SO?

A. YES.

Q. DID YOU EVER DISCUSS WITH ANY OF THE DISTRIBUTORS WHETHER, IF THEY FAILED TO HOLD THE RESALE PRICE OF SORBOTHANE, THEIR RIGHT TO CONTINUE TO ACT AS A DISTRIBUTOR WOULD BE AFFECTED?

A. YES.

Q. WITH WHOM DID YOU HAVE THOSE DISCUSSIONS.

A. SPECIFICALLY WITH MARTY VOGEL.

Q. WHAT DID YOU TELL MR. VOGEL WITH REGARD TO THE CONSEQUENCES TO HIS DISTRIBUTORSHIP IF HE DID NOT MAINTAIN THE RESALE PRICE?

A. THAT IT WOULD REFLECT NEGATIVELY REGARDING HIS PERFORMANCE APPROVAL OR EVALUATION.

Q. DID YOU DISCUSS WITH KENNETH M. LEIGHTON THE FACT THAT YOU EITHER HAD OR MADE SUCH A STATEMENT TO MR. VOGEL?

A. I WAS DIRECTED BY MR. LEIGHTON TO MAKE THAT STATEMENT.

Q. DID YOU UNDERSTAND THAT THE OTHER DISTRIBUTORS – STRIKE THE QUESTION.

TO YOUR KNOWLEDGE, WERE THE OTHER DISTRIBUTORS AWARE OF THE FACT THAT, IF RESALE PRICES WERE NOT MAINTAINED, THEIR DISTRIBUTORSHIP WOULD BE IN JEOPARDY?

[829]

MR. MAC ADAMS: OBJECTION.

MR. VAIL: OBJECTION.

THE COURT: I WILL OVERRULE THE OBJECTION. YOU CAN ANSWER THAT.

THE WITNESS: YES.

BY MR. SHOHET:

Q. NOW, I WOULD LIKE TO TALK TO YOU A LITTLE BIT WITH REGARD TO THE PRICING POLICIES, IF ANY, THAT RELATED TO THE RETAIL PRICE FOR SORBOTHANE.

DID YOU HAVE DISCUSSIONS WITH ANY OF THE DISTRIBUTORS CONCERNING THEIR RESPONSIBILITIES TO SEE THAT THE RETAIL PRICE OR THE PRICE SOLD BY THEIR CUSTOMERS TO THE PUBLIC WAS FIXED?

A. YES.

Q. WITH WHOM DID YOU HAVE SUCH DISCUSSIONS?

A. MARTY VOGEL.

Q. ANY OTHERS?

A. HE'S THE ONLY ONE I SPECIFICALLY REMEMBER.

Q. DO YOU REMEMBER WHEN THAT CONVERSATION OR CONVERSATIONS TOOK PLACE?

A. I BELIEVE IN THE SAME TIMEFRAME, FALL OF 1981.

Q. TELL ME WHAT YOU TOLD MR. VOGEL WITH REGARD TO HIS RESPONSIBILITIES AS TO THE RETAIL PRICE.

A. THAT, IF THERE WAS – THERE WAS ONE SPECIFIC CASE IN WHICH A RETAILER WAS SELLING BELOW RECOMMENDED LIST IN HIS TERRITORY; AND WE REQUESTED THAT MARTY FOLLOW UP ON THAT ACCOUNT AND FIND

[830]

OUT WHAT THE PROBLEM WAS AND TO RECTIFY IT.

Q. WAS THAT A CIRCUMSTANCE - DO YOU REMEMBER THE STATE IN WHICH THE RETAILER WAS UNDERCUTTING THE RETAIL PRICE?

A. NO, I DON'T.

Q. IF I SAID WEST VIRGINIA, WOULD THAT REFRESH YOUR RECOLLECTION?

A. I RECALL THAT THERE WAS A PROBLEM IN WEST VIRGINIA. I DON'T RECALL IF THAT ONE WAS SPECIFICALLY TIED TO MARTY VOGEL.

Q. THE PROBLEM THAT YOU RECALL IN WEST VIRGINIA, WAS THAT ALSO RELATED TO A RETAILER NOT SELLING AT THE, QUOTE, "RECOMMENDED," CLOSE QUOTE, LIST PRICE?

A. YES.

Q. DID YOU EVER HAVE A DISCUSSION WITH KENNETH B. LEIGHTON WHERE HE TOLD YOU WHAT, IF ANYTHING, HE DID, TO CONTROL RETAIL PRICES IN HIS TERRITORY?

A. YES.

Q. DO YOU REMEMBER WHEN - DID YOU HAVE MORE THAN ONE CONVERSATION WITH KENNETH B. LEIGHTON ON THAT SUBJECT?

A. NO.

Q. DO YOU REMEMBER WHEN THAT CONVERSATION OCCURRED?

A. I BELIEVE IT OCCURRED AFTER I STARTED WORKING FOR HIM, WHICH WOULD PUT IT IN EARLY SPRING OF 1983.

Q. WHAT DID HE TELL YOU WITH REGARD TO WHAT STEPS, IF ANY, HE TOOK TO SEE THAT HIS RETAILERS HELD THE PRICE?

A. HE WOULD SLOW DOWN SHIPMENTS.

[831]

Q. HE TOLD YOU THAT?

A. YES.

Q. HE SAID HE SLOWED SHIPMENTS AS A MEANS OF KEEPING THE RETAIL PRICES FIXED?

A. YES.

Q. DID MR. LEIGHTON EVER TELL YOU TO CONTACT A DISTRIBUTOR AS A RESULT OF THAT A RETAILER IN THAT DISTRIBUTOR'S TERRITORY WAS UNDERCUTTING THE RETAIL PRICE?

A. I AM SORRY, REPEAT THE QUESTION.

Q. DID MR. LEIGHTON, SR., EVER TELL YOU TO CONTRACT THE DISTRIBUTOR BECAUSE HE HAD LEARNED - "HE" BEING MR. LEIGHTON, SR. - HAD LEARNED THAT A RETAILER IN THAT DISTRIBUTOR'S TERRITORY WAS SELLING BELOW THE RETAIL PRICE?

A. THE ONE SPECIFIC CASE THAT HE TOLD ME TO FOLLOW UP WAS ON THE WEST VIRGINIA ISSUE.

Q. DID HE TELL YOU TO CONTACT THE DISTRIBUTOR THAT COVERED THE WEST VIRGINIA TERRITORY BECAUSE HE LEARNED THAT A RETAILER WAS SELLING BELOW THE RECOMMENDED PRICE?

A. YES.

Q. DO YOU REMEMBER WHO THE DISTRIBUTOR WAS AT THAT TIME THAT WAS COVERING THE TERRITORY?

A. I BELIEVE THAT IT WAS OHIO CUSHIONS AT THAT TIME.

Q. DO YOU REMEMBER THE NAME OF THE RETAILER THAT WAS CUTTING THE PRICE?

A. NO.

[832]

Q. DO YOU REMEMBER THE OTHER OCCASIONS WHERE THE FACT THAT A RETAILER WAS UNDERCUTTING THE SUGGESTED RETAIL PRICE CAUSED MR. LEIGHTON TO TELL YOU TO DO SOMETHING?

A. NO.

Q. ALL RIGHT. NOW, I WOULD LIKE TO MOVE YOUR ATTENTION, IF I MIGHT, TO A MEETING AT KENNETH B. LEIGHTON'S OFFICE, WHEREIN YOU WERE PRESENT, JOHN BURNE WAS PRESENT, AND KENNETH M. LEIGHTON WAS PRESENT, APPROXIMATELY A WEEK TO TEN DAYS BEFORE THE FEBRUARY DISTRIBUTORS' MEETING.

DO YOU HAVE THAT MEETING IN MIND?

A. YES.

Q. JUST TO SET THE CONTEXT, DO YOU REMEMBER THE DATE OR APPROXIMATE DATE THAT THAT MEETING OCCURRED?

A. APPROXIMATE DATE, LAST WEEK IN JANUARY.

Q. AS OF THIS MEETING, HAD JOHN BURNE'S APPOINTMENT AS THE NATIONAL MEDICAL DISTRIBUTOR ALREADY BEEN ANNOUNCED TO THE REGIONAL DISTRIBUTORS?

A. YES.

Q. AND THERE WAS A MEETING SCHEDULED AT THIS TIME IN CHICAGO, ON FEBRUARY 10, BETWEEN ALL THE DISTRIBUTORS, ALL THE REGIONAL DISTRIBUTORS, CORRECT?

A. YES.

Q. AND THIS MEETING OCCURRED WHERE? WAS IT AT – WHERE DID THE MEETING OCCUR?

A. WE HAD THE MEETING, I BELIEVE, IN – AT THE MC CORMICK INN,

[833]

WHICH IS THE HOTEL THAT THE MAJORITY OF US WERE STAYING IN AT THIS TIME.

Q. THAT'S THE FEBRUARY CHICAGO MEETING?

A. RIGHT.

Q. ALL RIGHT. NOW, I AM GOING BACK TO THE MEETING INVOLVING MR. BURNE, YOURSELF, AND KENNETH M. LEIGHTON, SR., AND KENNETH B. LEIGHTON.

WHERE DID THAT OCCUR?

A. THAT MEETING TOOK PLACE IN KEN B. LEIGHTON'S OFFICE.

Q. AGAIN, THAT WAS ABOUT A WEEK OR TEN DAYS BEFORE THE CHICAGO MEETING?

A. YES.

Q. DID YOU DISCUSS WITH KENNETH M. LEIGHTON, PRIOR TO THE MEETING, WHAT HIS PURPOSE WAS?

A. YES.

Q. WHAT WAS YOUR UNDERSTANDING OF ITS PURPOSE, BASED ON THAT CONVERSATION?

A. THE PURPOSE FOR THE MEETING – AND THE MEETING WAS PRIMARILY MOTIVATED AT THE REQUEST OF JOHN BURNE – WAS TO REEVALUATE OUR MARKETING APPROACH; AND WHAT WE MEAN BY THAT IS: WE HAD JUST ANNOUNCED A CENTRALIZED NATIONAL DISTRIBUTOR FOR THE MEDICAL MARKET; AND, ON THE OTHER SIDE, WE HAD FIVE REGIONAL DISTRIBUTORS SELLING SHOE INSERTS TO THE RETAIL MARKET. SO THERE WAS A LOT OF OVERLAP ON THAT. JOHN BURNE FELT THAT THAT WAS GOING TO BE A PROBLEM.

[834]

Q. DID MR. BURNE EXPRESS HIS VIEWS ON THAT SUBJECT TO YOU?

A. YES.

Q. DID HE SAY WHY HE FELT THAT IT WOULD BE A PROBLEM CONTINUING TO DEAL WITH FIVE REGIONAL DISTRIBUTORS?

A. IT WOULD BE A PROBLEM OF CONTROL FOR HIM AND – BECAUSE THE FIVE ORIGINAL DISTRIBUTORS WERE MARKETING TO RETAIL MEDICAL OUTLETS, THE SAME MARKET THAT JOHN BURNE WAS GOING TO BE APPROACHING.

Q. WAS JOHN BURNE'S PRICE TO HIS CUSTOMERS – STRIKE THE QUESTION.

WAS THE PRICE AT WHICH JOHN BURNE'S CUSTOMERS INTENDED TO SELL SORBOTHANE HIGHER THAN THE PRICE AT WHICH THE RETAIL CUSTOMERS WERE SELLING SORBOTHANE TO RETAIL ACCOUNTS OR RETAIL CONSUMERS?

A. YES.

MR. MAC ADAMS: OBJECTION. FOUNDATION, YOUR HONOR.

THE COURT: I WILL OVERRULE THE OBJECTION. THE ANSWER MAY STAND.

BY MR. SHOHET:

Q. WAS THERE ANY DISCUSSION ABOUT THE PRICE DIFFERENCE BETWEEN THE PRICE OF SORBOTHANE IN THE MEDICAL MARKET AND THE PRICE OF SORBOTHANE IN THE ATHLETIC MARKET AS A FACTOR CAUSING THE NEED FOR THIS MEETING?

A. YES.

Q. DID YOU HAVE SUCH DISCUSSIONS WITH JOHN BURNE CONCERNING

[835]

HOW THE PRICE DIFFERENTIAL AFFECTED THE NEED FOR CONTROL OF THE MARKET?

A. JOHN BURNE'S MARKETING APPROACH WAS THAT HE WAS SELLING THE SAME INSOLE THE OTHER FIVE DISTRIBUTORS WERE SELLING, PURCHASING THAT INSOLE FOR LESS THAN THE OTHER DISTRIBUTORS WERE PURCHASING IT FOR, AND THEN RESELLING IT FOR APPROXIMATELY TWICE AS MUCH AS WHAT THE SPORTING GOODS STORES WERE SELLING IT FOR. SO, IN ESSENCE, WHAT WAS HAPPENING WAS: A DOCTOR COULD GO DOWN TO A SPORTING GOODS STORE, BUY A PAIR OF INSOLES CHEAPER THAN GETTING IT FROM JOHN BURNE.

Q. AND DID MR. BURNE EXPRESS TO YOU OR ANYONE ELSE AT THE MEETING A DESIRE TO HAVE A SINGLE NATIONAL DISTRIBUTOR IN THE SPORTS MARKET?

A. THAT WAS JOHN BURNE'S DESIRE.

Q. DID HE SAY WHY HE WANTED A SINGLE NATIONAL DISTRIBUTOR IN THE SPORTS MARKET?

A. IT WOULD BE EASIER FOR HIM TO ENTER INTO AN AGREEMENT WITH ONE PERSON, PERHAPS ENTICE THAT PERSON TO ALSO RAISE THEIR PRICES, OR AT LEAST NOT INFRINGE ON HIS MARKET.

Q. NOW, WAS THERE A DISCUSSION AT THIS MEETING CONCERNING WHAT, IF ANYTHING, TO DO TO THE OTHER REGIONAL DISTRIBUTORS, THAT IS THE DISTRIBUTORS OTHER THAN KENNETH B. LEIGHTON?

A. YES.

Q. TELL ME WHO SAID WHAT ON THE SUBJECT OF WHAT TO DO ABOUT THE OTHER REGIONAL DISTRIBUTORS?

[836]

A. WELL, TO SET UP THE MEETING, THE MEETING WAS CALLED TO DISCUSS – BY JOHN BURNE TO DISCUSS HOW WE COULD REALIGN THE RETAIL MARKETING ON THE INSOLES OF THE FIVE DISTRIBUTORS TO A NATIONAL SYSTEM. THAT WAS THE POINT OF THE MEETING.

THE NEXT STEP WAS: HOW WOULD YOU DO THIS WITH THE FIVE DISTRIBUTORS? THE FIRST RECOMMENDATION FROM JOHN BURNE AND KEN LEIGHTON, SR., WAS SIMPLY THAT HE WOULD CANCEL THEM AND THEN NAME ONE NATIONAL DISTRIBUTOR.

Q. WAS THERE DISCUSSION ABOUT WHO THAT NATIONAL DISTRIBUTOR WOULD BE?

A. YES.

Q. AND WHO WAS – WHO WAS THE NATIONAL DISTRIBUTOR TO BE IN THOSE DISCUSSIONS?

A. KEN LEIGHTON, JR.

Q. DO YOU REMEMBER BOTH KENNETH M. LEIGHTON AND JOHN BURNE SUGGESTING THAT THE OTHER REGIONAL DISTRIBUTORS SIMPLY BE CANCELED?

A. YES.

Q. DID YOU SAY ANYTHING IN RESPONSE TO THE SUGGESTION IN OR ABOUT JANUARY OF 1982 CONCERNING THE CANCELLATION OF THE OTHER REGIONAL DISTRIBUTORS?

A. YES. MY CONCERN – AND I WAS AT THE MEETING, ALSO. MY CONCERN WAS THAT I FELT THAT WE HAD GIVEN A VERBAL COMMITMENT TO THESE FIVE DISTRIBUTORS AND HAD ENTERED INTO A RELATIONSHIP WITH THEM. I DID NOT UNDERSTAND HOW WE COULD CANCEL THESE

[837]

DISTRIBUTORS WITHOUT CAUSE; AND TO TAKE THAT ONE STEP FURTHER, IF WE DID CANCEL THE DISTRIBUTORS WITHOUT CAUSE, THAT THERE WOULD BE SOME LEGAL RAMIFICATIONS FOR THAT.

Q. FOLLOWING YOUR COMMENT IN THAT REGARD, WAS A SECOND ALTERNATIVE DISCUSSED CONCERNING HOW TO MAKE KENNETH B. LEIGHTON THE NATIONAL DISTRIBUTOR?

A. YES.

Q. WHAT WAS THE SECOND ALTERNATIVE?

A. THE SECOND ALTERNATIVE WAS TO CONVINCE R.H.R., SORBOTURF, TRIAD, ABSORBOTECH, THE FOUR OTHER DISTRIBUTORS, TO RECOGNIZE KEN AS A NATIONAL MANAGER IN THAT PARTICULAR MARKET, AND HE WOULD MANAGE THE BUSINESS FOR THESE FOUR OTHER DISTRIBUTORS. THEY WOULD MAINTAIN THEIR TERRITORIES, BUT THE BUSINESS DECISIONS ON HOW TO MARKET WOULD BE MANAGED BY KEN.

Q. WAS THERE SOME DISCUSSION AS TO JUST HOW YOU WOULD GO ABOUT CONVINCING THE OTHER REGIONAL DISTRIBUTORS THAT KENNETH B. LEIGHTON AND OHIO CUSHIONS WOULD BE THE NATIONAL LEADER OF THE MARKET?

A. YES.

Q. WHAT WAS DISCUSSED ON THAT SUBJECT AT THE MEETING?

A. THE REASON WE FELT THAT THIS MIGHT BE A VIABLE ALTERNATIVE IS THAT KEN DID HAVE THE STRONGEST BUSINESS SENSE OF THE FIVE DISTRIBUTORS, OR AT LEAST THAT WAS OUR PERSPECTIVE AT THE TIME; AND SO WE WANTED TO USE THAT ARGUMENT, THAT IT MAY BE BENEFICIAL FOR THEM TO RECOGNIZE THAT EXPERTISE AND TAKE ADVANTAGE OF

[838]

IT.

Q. DID KENNETH M. LEIGHTON, AT OR SHORTLY AFTER THIS MEETING, GIVE YOU DIRECTION TO ATTEMPT TO PORTRAY KENNETH B. LEIGHTON AND HIS COMPANY AS THE NATIONAL LEADER AMONG THE DISTRIBUTORS?

A. I WAS TOLD TO PURSUE THAT, YES.

THE COURT: DON'T LEAD IN THIS AREA, SIR. LET HER TESTIFY.

MR. SHOHET: ALL RIGHT.

BY MR. SHOHET:

Q. DID YOU HAVE SUCH A DISCUSSION WITH KENNETH M. LEIGHTON AT THE MEETING ITSELF?

A. THE MEETING RESOLVED THAT THAT WAS THE APPROACH WE WOULD TAKE AS OPPOSED TO CANCELING THE DISTRIBUTORS, AND THAT THIS APPROACH WOULD BE PRESENTED AT THE CHICAGO MEETING.

Q. FOLLOWING THE MEETING, WHAT, IF ANYTHING, DID YOU DO, IN OTHER WORDS, TO BE PREPARED TO PORTRAY KENNETH B. LEIGHTON AS A NATIONAL DISTRIBUTOR AT THE UPCOMING CHICAGO MEETING?

A. I PUT TOGETHER A SERIES OF STATISTICS, AS FAR AS SALES, CUSTOMERS, NUMBER OF OUTLETS, THAT TYPE OF THING, AS A COMPARISON CHART BETWEEN EACH DISTRIBUTOR.

Q. WOULD YOU TAKE A MOMENT NOW AND LOCATE EXHIBIT 441 IN YOUR BOOK?

IS EXHIBIT 441 A CHART THAT YOU PREPARED FOR PRESENTATION AT THE FEBRUARY, '82, SALES MEETING IN CHICAGO?

A. YES.

[839]

MR. SHOHET: I WOULD OFFER IT INTO EVIDENCE, YOUR HONOR.

THE COURT: IS THERE ANY OBJECTION?

MR. BOMSTER: NO OBJECTION, YOUR HONOR.

(PLAINTIFFS' EXHIBIT 441 RECEIVED.)

MR. SHOHET: MAY I PUBLISH IT TO THE JURY?

THE COURT: YES.

BY MR. SHOHET:

Q. FIRST OF ALL, DID YOU PREPARE EXHIBIT 441 FOLLOWING THE MEETING THAT WE HAVE JUST BEEN DISCUSSING, FOLLOWING THE MEETING AT KENNETH B. LEIGHTON'S OFFICE AND PRIOR TO THE CHICAGO SALES MEETING?

A. YES.

Q. WAS EXHIBIT 441 ACTUALLY PRESENTED AT THE CHICAGO MEETING AMONG ALL THE DISTRIBUTORS?

A. YES.

Q. ARE THE FIGURES FOR OHIO CUSHIONS FOR DECEMBER, 1981, CORRECT OR INCORRECT?

A. INCORRECT.

Q. DID YOU PREPARE EXHIBIT 441, INTENTIONALLY INSERTING AN INCORRECT FIGURE IN DECEMBER, 1981, FOR OHIO CUSHIONS' SALES FIGURES?

A. YES.

Q. IN WHAT SENSE IS THE DECEMBER, 1981, FIGURE INCORRECT? HOW IS IT INCORRECT?

[840]

A. THE FIGURE IS INFLATED.

Q. BY HOW MUCH IS IT INFLATED, OR HOW DID YOU COME UP WITH THAT FIGURE, IF YOU REMEMBER?

A. I TOOK THE ORDERS PLACED FOR JANUARY AND ROLLED THEM BACK INTO DECEMBER.

Q. DID YOU INCLUDE THE DECEMBER FIGURES AS WELL AS THE JANUARY FIGURES?

A. I ADDED DECEMBER AND JANUARY TOGETHER AND CREATED THAT AS THE DECEMBER FIGURE.

Q. WHY DID YOU DO THAT?

A. BECAUSE ORIGINALLY, IN ORDER TO SELL THE IDEA TO THESE DISTRIBUTORS THAT – ABOUT KEN'S EXPERTISE AND THE BENEFIT OF IT, WE TRIED TO HAVE A COMPARISON GRAPH. ON THAT COMPARISON GRAPH, AT THAT TIME, KEN'S PERFORMANCE WAS NOT – WAS GOOD, BUT NOT – WE DID NOT FEEL STRONG ENOUGH TO BE ABLE TO CONVINCE THEM THAT HE WAS THAT FAR AHEAD OF THEIR OWN BUSINESSES.

Q. WHOSE IDEA WAS IT TO FALSIFY THE SALES FIGURE FOR DECEMBER, 1981, FOR PRESENTATION AT THE MEETING IN CHICAGO?

A. KEN LEIGHTON, SR.

Q. IN ADDITION TO THIS DOCUMENT, DO YOU REMEMBER A GRAPH BEING CREATED FOR USE AT THE FEBRUARY SALES MEETING THAT DEPICTED THE VARIOUS SALES LEVELS OF THE REGIONAL DISTRIBUTORS?

A. YES.

Q. AND DID THAT GRAPH ALSO OVERSTATE KENNETH B. LEIGHTON AND OHIO CUSHIONS' PERFORMANCE FOR DECEMBER, 1981?

[841]

A. YES.

Q. DID THE ATTEMPT TO USE THE SALES FIGURES AS A MEANS OF PERSUADING THE OTHER REGIONAL DISTRIBUTORS TO RECOGNIZE OHIO CUSHIONS AS THE NATIONAL LEADER WORK?

A. NO.

Q. FOLLOWING THE – BY THE WAY, LET'S COVER THAT MEETING NOW.

THE MEETING THAT WE HAVE BEEN TALKING ABOUT WHERE THESE FIGURES WERE PRESENTED, THAT WAS A FEBRUARY 10, 1982, MEETING IN CHICAGO, RIGHT?

A. YES.

Q. WHO PAID FOR THE EXPENSES TO ATTEND THAT AMONG THE DISTRIBUTORS?

A. ALL OF THE DISTRIBUTORS PAID FOR THEIR OWN EXPENSES TO GET THERE, LODGING. THEY ALSO WERE ASKED TO CONTRIBUTE TO SOME OF THE COST OF THE SHOW.

Q. IN ADDITION TO PRESENTING THE SALES FIGURES THAT WE HAVE JUST BEEN TALKING ABOUT, WAS THERE ANY FURTHER DISCUSSION AT THE SALES MEETING CONCERNING THE PRICING REQUIREMENTS, SPECIFICALLY THE REQUIREMENT TO HOLD THE RESALE PRICE?

A. YES. THERE WAS A SPECIFIC DISCUSSION ABOUT MAINTAINING CONSISTENCY ON THE WHOLESALE PRICE.

Q. DO YOU REMEMBER ANY FURTHER DISCUSSION ABOUT THE NEED TO CONTROL THE RETAIL PRICE, AS WELL, AT THE MEETING?

A. NO.

Q. NOW, WAS JOHN BURNE ALSO PRESENT AT THIS SALES MEETING IN

[842]

CHICAGO?

A. YES.

Q. DID HE PARTICIPATE AT ALL, OR DID HE JUST SIT THERE?

A. HE DID NOT PARTICIPATE.

Q. NOW, FOLLOWING THE MEETING IN CHICAGO ON FEBRUARY 10, DID YOU REPORT BACK TO KENNETH M. LEIGHTON REGARDING YOUR OBSERVATION THAT IT WAS NOT GOING TO WORK – THAT IS, THE USE OF THESE SALES FIGURES WAS NOT GOING TO PERSUADE THE OTHER DISTRIBUTORS TO GIVE UP THEIR TERRITORIES TO KENNETH B. LEIGHTON OR RECOGNIZE HIM AS THE NATIONAL LEADER?

A. YES, I DID.

Q. FOLLOWING THAT CONVERSATION WITH KENNETH M. LEIGHTON, DO YOU RECALL HAVING DISCUSSIONS WITH HIM CONCERNING HOW TO – DISCUSSIONS, IF AT ALL, CONCERNING HOW TO DEAL WITH THE OTHER REGIONAL DISTRIBUTORS?

A. THERE WERE NUMEROUS DISCUSSIONS AFTER THAT POINT ABOUT THIS ISSUE.

Q. AND JUST TELL ME WHAT THE TOPIC OF THOSE DISCUSSIONS – WE'LL PICK THEM UP IN DETAIL AS WE GO, BUT WHAT WAS THE GENERAL TOPIC OF THE DISCUSSIONS THAT YOU HAD WITH KENNETH N. LEIGHTON AFTER YOU REPORTED THIS TO HIM?

A. THE PROBLEM WAS, SINCE WE WERE NOT SUCCESSFUL IN CONVINCING THE DISTRIBUTORS TO RECOGNIZE KEN, THEN WE WERE BACK TO THE FIRST RECOMMENDATION THAT HAD BEEN MADE AT THE LAST WEEK IN JANUARY, AT KEN LEIGHTON, JR.'S, OFFICE, TO CANCEL THE DISTRIB-

[843]

UTORS.

NOW, THE PROBLEM WITH THAT IS: THE DISTRIBUTORS WERE PERFORMING ADEQUATELY AT THIS TIME. I STILL MAINTAINED THAT YOU – THAT, EVEN THOUGH THERE IS NO CONTRACT, THERE WAS SOME TYPE OF VERBAL COMMITMENT TO THESE PEOPLE.

Q. DO YOU RECALL MORE THAN ONE CONVERSATION AFTER YOUR REPORT TO MR. LEIGHTON, SR., CONCERNING THE FEBRUARY MEETING ON THE SUBJECT OF WAYS TO GET RID OF THE OTHER DISTRIBUTORS?

A. THROUGHOUT THE COURSE OF 1982, YES.

Q. DO YOU REMEMBER HOW MANY CONVERSATIONS ON THE SUBJECT OF ELIMINATING OTHER DISTRIBUTORS YOU HAD WITH KENNETH M. LEIGHTON THROUGHOUT 1982 AND UP TO YOUR LEAVING SORBO, INC.?

A. I CAN'T RECALL THE EXACT NUMBER.

Q. I WOULD LIKE TO TURN FOR A MOMENT TO THE ADVERTISING BUDGETS THAT WERE SET FOR THE REGIONAL DISTRIBUTORS OTHER THAN THE TWO TRADE SHOWS.

OTHER THAN THE TRADE SHOWS THAT YOU HAVE IDENTIFIED, DO YOU REMEMBER HAMILTON KENT OR SORBO PAYING ANYTHING FOR THE NATIONAL ADVERTISING OF SORBOTHANE?

A. THEY WERE PAYING SOMETHING INTO THE NATIONAL AD BUDGET.

Q. TAKE A LOOK, IF YOU WOULD, FOR A MOMENT, AT EXHIBIT 442 IN THE BOOK.

HAVE YOU FOUND IT?

A. YES.

Q. CAN YOU IDENTIFY EXHIBIT 442?

Supreme Court, U.S.
FILED
MAY 28 1992
OFFICE OF THE CLERK

No. 91-10

IN THE

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON,
Petitioners,

vs.

SHIRLEY MCQUILLAN and LARRY MCQUILLAN
dba SORBOTURF ENTERPRISES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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May 14, 1992

PETITION FOR CERTIORARI FILED JULY 1, 1991
CERTIORARI GRANTED MARCH 30, 1992

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Relevant Docket Entries, Case No. 84-15853 (CM), United States District Court, Southern District of California 1

Relevant Docket Entries, Case Nos. 89-55326, 89-55329, 89-55332, United States Court of Appeals, Ninth Circuit 7

Second Amended Complaint (July 21, 1986)..... 10

Answer of Defendants Kenneth B. Leighton and Spectrum Sports, Inc. to Second Amended Complaint (August 13, 1986) 51

Pretrial Order (April 28, 1988) 63

Transcript of Proceedings (Trial Commenced May 3, 1988) 148

Opening Statement for Defendants 148

Plaintiffs' Witnesses:

Shirley McQuillan—

Direct Examination 149

Cross Examination 160

Laurene Heinsohn--

Direct Examination 172

Cross Examination 190

Kenneth M. Leighton, Sr.—

Direct Examination 197

Martin Vogel—

Direct Examination 202

Maurice Hiles—

Direct Examination 207

Cross Examination 215

Redirect Examination. 218

John Cahill—

By Deposition 219

Defendants' Witnesses:

James Forsyth—

Direct Examination 223

Kenneth Leighton, Jr.—

Direct Examination 223

Cross Examination 237

Kenneth Leighton, Sr.—

Direct Examination 238

John Cahill—

Cross Examination 242

Plaintiffs' Rebuttal Witnesses:

Laurene Heinsohn—

Direct Examination 243

Shirley McQuillan—

Cross Examination 244

Settlement Conference 246

Final Instructions of the Court 251

Plaintiffs' Exhibits

8. Letter to Shirley McCone from K.M. Leighton dated 8/1/83 257

10. Letter to Shirley McCone from Laurene Heinsohn dated 10/82 258

30.2. Memo to John Cahill from C.A. Risley 260

30.3. Inter-memo to K.M. Leighton from J.C. Cahill dated 1/28/82 266

35A. Edited letter to George Keeling from John Cahill dated 6/27/83 268

47. Inter-memo to J.T. Gentile from J.C. Cahill dated 6/18/82 271

57. Letter to Shirley McCone from Kenneth Leighton dated 7/2/82 272

64. Letter to Shirley McCone from K.M. Leighton dated 6/3/83 274

64.3. Letter to Shirley McCone from K.M. Leighton dated 6/14/83 275

133. Announcement to Sorbothane dealers of price increases on Sorbothane shoe inserts effective 7/15/82 276

240A. John Cahill's notes on meeting of 6/28/83, with Maurice Hiles 277

268. Monthly Report—February 1983 for Central Development Department Burton-on-Trent to W.D.T. Tapley from G.W. Keeling dated 3/9/83 282

331. Letter to Hamish Cameron of BTR Silvertown Limited from Kenneth M. Leighton dated 12/22/81 reviewing items discussed at 12/17 meeting 291

333. Letter to Nicholas Heckford of Mission Electronics from K.M. Leighton dated 8/30/82 294

359. J.C. Cahill's notes of meeting with K.M. Leighton dated 6/7/83 296

360. Signed Sorbothane Agreement between Hamilton Kent Mfg. and BTR Development Services, dated 8/20/80..... 298

375. Telex to Brian Crowther from Laurene Heinsohn dated 10/1/82 300

376. Telex to Laurene Heinsohn from Brian Crowther dated 10/5/82 responding to Crowther's 10/1/82 telex 302

399. Handwritten draft of a letter by KML regarding good relationship with L&B; properties of the polymer; market cooperation; price equalization 303

402. Letter to John Cahill from Ken M. Leighton dated 10/22/82 305

403. John Cahill's notes of meeting with K.M. Leighton dated 6/10/82 307

404. John Cahill's notes of meeting with K.M. Leighton dated 8/5/82 309

407. Letter to Laurene Heinsohn from Nicholas Heckford of Mission Electronics dated 8/27/82 313

409. Telex to Brian Crowther from K.M. Leighton dated 10/21/82 314

410. Letter to Richard Werschkul of Nike from Kenneth M. Leighton dated 11/10/82 315

411. Letter to George Keeling from K.M. Leighton dated 12/6/82 318

412. John Cahill's notes of meeting with K.M. Leighton dated 12/7/82 321

414. Inter-memo to Ken M. Leighton from G.W. Keeling dated 2/28/83 323

415. Letter to George Keeling from Kenneth M Leighton dated 3/18/83 326

416. Telex to G. Keeling from K.M. Leighton dated 3/15/83 328

421. John Cahill's notes of meeting with Brian Crowther dated 4/7/83 330

424. Departmental correspondence to John Cahill from K.M. Leighton dated 5/2/83 334

425. Letter to K. Hills from G.W. Keeling dated 6/14/83 338

429. Letter to K.M. Leighton from J.B. Cameron of BTR dated 8/20/80 344

440. Letter to Hamilton-Kent distributors from Laurene Heinsohn dated 1/6/82 346

•478. Telex to Alan Jackson from K.M. Leighton dated 5/25/83 348

482. Letter to K.M. Leighton from G.W. Keeling dated 2/11/83 350

483. John Cahill's notes of meeting with K.M. Leighton dated 3/31/83 351

1075T. Telex to David Sharrock from John Cahill dated 6/1/82 357

1181T. North America Reorganization 358

1245. Intermemo to K.M. Leighton from G.W. Keeling dated 6/27/83 363

Defendants' Exhibits

QA. Sorboturf Enterprises Balance Sheets and Profit and Loss Statements 364

MMB. Shipping information to Cascade Orthopedic 385

IT. Letter, undated, from Shirley McCone to Mr. Leighton. 386

Defendants' Proposed Jury Instructions 388

Special Verdict Form (July 11, 1988) 396

Judgment of the District Court (August 12, 1988) (Note) 423

Memorandum Decision of the District Court (December 19, 1988) 424

Order of the District Court (December 19, 1988) 433

Notice of Appeal of Spectrum Sports, Inc. and Kenneth B. Leighton (January 13, 1989) 434

Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit (July 3, 1990) (Note) 435

Order of the United States Court of Appeals for the Ninth Circuit denying Petition for Rehearing (April 1, 1991) (Note) 436

Civil No. 84-15853 (CM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHIRLEY McQUILLAN and LARRY McQUILLAN, Individually and dba SORBOTURF ENTERPRISES,
Plaintiffs,

vs.

SORBOTHANE, INC., (aka SORBO, INC.), HAMILTON-KENT MANUFACTURING COMPANY; BTR, INC., SPECTRUM SPORTS, INC., KENNETH M. LEIGHTON and KENNETH B. LEIGHTON, JR.,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
7-19-84	1	Fld Plntf's complaint for damages for violation of the Antitrust Laws; Breach of Contract; fraud; violation of

DATE	NR.	PROCEEDINGS
		Federal Racketeering laws; Unfair competition; Bad Faith; interference with Prospective Advantage and Conversion JS-5.
6-7-85	52	Fld by defts—ANSWER of deft SORBOTHANE INC. c/s.
6-7-85	53	Fld by defts—ANSWER of deft BTR INC.
6-7-85	54	Fld by deft—separate answer of deft SPECTRUM SPORTS INC. c/s
11-27-85	83	Fld Pltfs—FIRST AMENDED COMPLAINT for damages for violation of the antitrust laws (secs 1 & 2 of the Sherman Act and sec 3 of the Clayton act); breach of contract; fraud, violation of federal racketeering laws; Unfair competition; bad faith breach of implied covenant of good faith and fair dealing; violation of the Cartwright act. Pltf demand a trial by jury on all claims and all issues.
11-27-85	84	Fld deft—SORBOTHANE, INC., H A M I L T O N - K E N T MANUFACTURING CO., BTR, INC.

DATE	NR.	PROCEEDINGS
		AND KENNETH M. LEIGHTON—ANSWER of deft Kenneth M. Leighton to First Amended complaint.
11-27-85	88	Fld Defts—KENNETH B. LEIGHTON AND SPECTRUM SPORTS—ANSWER to first amended complaint. t/w declaration of svc.
7-22-86	133	Fld by plfts second amended complt for damages for violation of the antitrust laws, sections 1 & 2 of the Sherman Act and Section 3 of the Clayton Act etc. Jury Trial demanded t/w dec of serv.
8-13-86	149	Fld answer of defs Kenneth B. Leighton and Spectrum Sports, Inc. to pltf's second amended complt, t/w dec of serv.
5-3-88		FIRST DAY OF JURY TRIAL: jurors impaneled & sworn. J/T cont'd 5-4-88 @ 9:15 AM

DATE	NR.	PROCEEDINGS
7-11-88		TWENTY SIXTH DAY OF JURY TRIAL—fld exhibits. Verdict fld for pltf. J/T cont'd 7-12-88 @ 1:30 (counsel) 2:00 PM (jurors).
7-11-88	346	SPECIAL verdict form by pltf
8-10-88	365	JUDGMENT—jdmt shall enter for pltfs Shirley and Larry McQuillan, Inc. and dba Sorboturf Enterprises, and against defts BTR Inc., Hamilton-Kent Manufacturing Co., Inc., Sorbothane, Inc. and Kenneth M. Leighton. Jdmt shall enter for the pltf Shirley and Larry McQuillan, Inc. and dba Sorboturf Enterprises, and against defts Spectrum Sports, Inc. and Kenneth B. Leighton. Jdmt shall enter for defts Spectrum Sports, Inc. and Kenneth B. Leighton and against pltfs Shirley and Larry McQuillan, Inc. and dba Sorboturf Enterprises. It is further ordered, adjudged and decreed that pltfs have and recover from defts BTR, Inc. Hamilton-Kent Manufacturing Co., Inc., Sorbothane, Inc., Spectrum Sports, Inc., Kenneth M. Leighton and Kenneth B. Leighton jointly and severally, the sum of One

DATE	NR.	PROCEEDINGS
		Million Seven Hundred and Forty-Three Thousand Dollars, said sum to be trebled to the sum of Five Million Two Hundred Twenty-Nine Thousand Dollars together with interest on all such sums at a rate of 7.95 percent per annum from the date hereof. (E) (entered 8-12-88) cc attys.
8-23-88	370	NOTICE of motion and hrg jdmt notwithstanding the verdict and a new trial set 9-26-88 @ 10:30 AM
12-19-88	435	MINUTES hrg defts mots to stay jmt/stay proceedings—Granted. cont to 3/13/89 at 10:30 a.m (E)
12-19-88	436	MEMORANDUM Decision (E)
12-19-88	437	ORDER: Defts mot for jmt n/w/s the verdict or in alt, a new trial—D. Ct grants pltfs mot for atty fees in amt of $912,032.50. pltfs mots for prejmt interest & to retaz costs are denied. (E) Ent 12/29/89. cys mld.
1-18-89	440	NOTICE OF APPEAL (APPEAL #1) BY DEFTS SORBOTHANE, et al. AS TO ORDER ENTERED 12-29-88.

DATE	NR.	PROCEEDINGS
1-18-89	441	NOTICE OF APPEAL (APPEAL #2) BY DEFTS SPECTRUM SPORTS, et al. AS TO ORDER ENTERED 12-29-88.

Case Nos. 89-55326, 89-55329, 89-55332

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY MCQUILLAN AND LARRY MCQUILLAN, Individually and d/b/a SORBOTURF ENTERPRISES,
Plaintiffs-Appellees,

v.

SORBOTHANE, INC., *et al.*,
Defendant,

and

SPECTRUM SPORTS, INC., and
KENNETH B. LEIGHTON,
Defendants-Appellants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10-16-89	Filed original and 15 copies Plfts-aples/x-aplts' (S. McQuillan, and L. McQuillan, individually and dba Sorboturf Enterprises) first brief on cross-appeal, 50 pages and 5 excerpts of record; served on 10/6/89 [89-55326, 89-55329, 89-55332] (rc) [89-55326 89-55329 89-55332]
12-1-89	Filed original and 15 copies Kenneth M. Leighton in 89-55326, Spectrum Sports in 89-55329, Kenneth B. Leighton in 89-55332

DATE	PROCEEDINGS
	second brief on cross-appeal 53 pages and of record, served on 11/28/89 [89-55326, 89-55329, 89-55332] (ec) [89-55326 89-55329 89-55332]
1-30-90	Filed original and 15 copies pltfs/aples/x-aplts, Larry McQuillan & Shirley McQuillan third brief on cross-appeal 75 pages and 5 supplemental excerpts of record, served on 1/26/90 [89-55326, 89-55329, 89-55332] (jlc) [89-55326 89-55329 89-55332]
2/20/90	Filed original and 15 copies dfdts/aplts/x-aples' x-appeal reply brief, 19 pages, served on 2/15/90 [89-55326, 89-55329, 89-55332] (jlc) [89-55326 89-55329 89-55332]
4/13/90	ARGUED AND SUBMITTED TO: TANG, O'SCANNLAIN, Marquez [89-55326, 89-55329, 89-55332] (mt) [89-55326 89-55329 89-55332]
7-3-90	FILED MEMORANDUM OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Unpublished. TANG, O'SCANNLAIN; Marquez, a.) FILED AND ENTERED JUDGMENT. [89-555326, 89-55329, 89-55332] (jlc) [89-55326 89-55329 89-55332]
7-17-90	[1784295] Filed original and 40 copies dfdts/aplts/x-aples Spectrum Sports, Inc. and Kenneth B. Leighton, Jr. petition for rehearing with suggestion for rehearing en banc (PANEL & ALL ACTIVE JUDGES) 15 pages, served on 7/16/90 [89-55326, 89-55329, 89-55332] (jlc) [89-55326 89-55329 89-55332]

DATE	PROCEEDINGS
4-1-91	Filed order (Thomas TANG, Diarmuid F. O'Scannlain, Alfredo C. Marquez.): The panel has voted to amend its 7/3/90 Memorandum Decision as follows: At pg. 22, the final sentence of the first full paragraph reading: "There was no objection to this instruction". shall be deleted. With the Memo Decision so amended, the panel as constituted above has voted to deny the pet. for rhrg and to reject the sugg. for rhrg en banc. The full ct has been advised of the sugg. for rhrg en banc, and no judge of the ct has requested a vote on the sugg. for rhrg en banc. FRAP 35(b). The pet. for rhrg is DENIED and the sugg. for rhrg en banc is REJECTED. It is so ordered. [89-55326, 89-55329, 89-55332] (sw) [89-55326 89-55329 89-55332]

Civil No. 84-15853 (CM)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(Title omitted in printing)

SECOND AMENDED COMPLAINT FOR DAMAGES FOR VIOLATION OF THE ANTITRUST LAWS (SECTIONS 1 & 2 OF THE SHERMAN ACT AND SECTION 3 OF THE CLAYTON ACT); BREACH OF CONTRACT; FRAUD; VIOLATION OF FEDERAL RACKETEERING LAWS (18 U.S.C. §1964(c)); UNFAIR COMPETITION; BAD FAITH BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING; VIOLATION OF THE CARTWRIGHT ACT (California Business and Professions Code Section 16600 and Section 16700)

[Jury Trial Demanded]

(Filed July 21, 1986)

Plaintiffs bring this action for treble damages resulting from defendants' violations of the antitrust laws and the racketeering laws of the United States, and for violation of the Cartwright Act, breach of contract, fraud, unfair competition, bad faith breach of the implied covenant of good faith and fair dealing, interference with prospective advantage and conversion under the laws of the State of California.

JURISDICTION AND VENUE

1. This Court has jurisdiction under sections 4 and 16 of the Act of Congress of October 15, 1914, 15 U.S.C. sections 15, 26, as amended, commonly known as the Clayton Act and 28 U.S.C. section 1337(a). The first

through third counts of the complaint arise under sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) and section 3 of the Clayton Act (15 U.S.C. §15);

2. Jurisdiction is also based on this court's jurisdiction to hear any civil action brought by any person injured in his business or property by reason of a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* ("RICO"). Counts six through nine of this complaint are filed pursuant to title 18 U.S.C. section 1964(c) to recover damages which plaintiffs have sustained due to violations of the federal racketeering laws;

3. Jurisdiction is also based on this court's pendent jurisdiction over the claims of plaintiffs arising under California law;

4. Jurisdiction is also based on the court's diversity jurisdiction, 28 U.S.C. section 1332(a)(1), in that the claims herein are between citizens of different states and involve matters in controversy in excess of the sum or value of $10,000.00 exclusive of interest and costs.

5. Venue is appropriate in this judicial district pursuant to the provisions of title 15 U.S.C. section 22, title 18 U.S.C. section 1965, and title 28 U.S.C. sections 1391(b) and (c) and section 1392(a). Each defendant maintains an office, transacts business, has an agent, transacts his affairs in or is found within this district. Plaintiffs reside in this district and plaintiffs' causes of action arose in this district and each defendant is within the jurisdiction of this court for the purpose of service. Many of the unlawful acts done pursuant to the combination and conspiracy hereinafter alleged were performed or carried out within this district; caused injury within the district and the interstate trade and

commerce hereinafter described was carried on, in part, within this district. The ends of justice require that all parties defendant be brought before this court and that the action be maintained in this district.

PARTIES

6. Plaintiffs SHIRLEY McQUILLAN and LARRY McQUILLAN are individuals residing in the County of San Diego, State of California and at all times material conducted business under the name SORBOTURF ENTERPRISES.

7. Defendant SORBOTHANE, INC. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Ohio. SORBOTHANE, INC. is a wholly-owned subsidiary of a company known as SW Industries which is a wholly-owned subsidiary of BTR, INC. Plaintiffs are informed and believed that SORBOTHANE, INC. was formerly known as SORBO, INC., which was formed in or about April 1982 to take over the Sorbothane business that had been conducted by HAMILTON-KENT MANUFACTURING COMPANY, a separate corporation which acted as a division of defendant BTR, INC. SORBOTHANE, INC. did, in fact, take over the Sorbothane business conducted by HAMILTON-KENT MANUFACTURING COMPANY and has acquired the assets and liabilities associated with the Sorbothane business of HAMILTON-KENT MANUFACTURING COMPANY. Hereinafter a reference to SORBOTHANE, INC. will include SORBO, INC. and HAMILTON-KENT MANUFACTURING COMPANY. At all times material since the formation of SORBOTHANE, INC., in or about April 1982, SORBOTHANE, INC. was the agent and alter ego of

BTR, INC. in that there was a failure to respect the separate corporate identity of SORBOTHANE, INC. by BTR, INC. and BTR, INC. completely controlled and dominated the affairs of SORBOTHANE, INC. In equity and fairness, the separate corporate identity of SORBOTHANE, INC., if any, should be disregarded and SORBOTHANE, INC. should be regarded as the agent and alter ego of BTR, INC.

8. Defendant BTR, INC. (hereinafter "BTR") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Rhode Island. Plaintiffs are informed and believe and thereupon allege that BTR, INC. is a wholly-owned subsidiary of either BTR, plc, BTR Industries, Ltd. or BTR, Silvertown, corporations organized and existing under the laws of the United Kingdom. The stock of BTR, plc, is publicly traded on the London Stock Exchange.

9. Defendant SPECTRUM SPORTS, INC. (formerly known as Ohio Cushions) is a corporation organized and existing under the laws of the State of Ohio with its principal place of business in Twinsburg, Ohio.

10. Defendant HAMILTON-KENT MANUFACTURING COMPANY (hereinafter "HAMILTON-KENT") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at the BTR offices in Providence, Rhode Island. At all times material and at least from the period of the acquisition of HAMILTON-KENT by BTR's subsidiary, SW Industries, and at least until the formation of SORBO, INC. in or about April or May, 1982, HAMILTON-KENT functioned as a division of BTR, INC. and was held out, in California and elsewhere, as a division of BTR, INC. In addition, at all

material times, HAMILTON-KENT was the agent and alter ego of BTR, INC. in that there was a failure to respect the separate corporate identity of HAMILTON-KENT by BTR and BTR completely controlled and dominated the affairs of HAMILTON-KENT. In equity and fairness, the separate corporate identity of HAMILTON-KENT, if any, should be disregarded and HAMILTON-KENT should be regarded as the agent and alter ego of BTR, INC.

11. Defendants KENNETH M. LEIGHTON and KENNETH B. LEIGHTON are father and son, respectively, and are each individual residents of the State of Ohio. KENNETH M LEIGHTON was, at all material times, president of SORBOTHANE, INC. and HAMILTON-KENT and KENNETH B. LEIGHTON was, at all material times, president of SPECTRUM SPORTS, INC.

NATURE OF TRADE AND COMMERCE

12. This complaint concerns a combination and conspiracy in restraint of trade and other wrongful conduct relating to a product known as Sorbothane which is a material the patent for which is held by an entity located in the United Kingdom known as British Technology Group. Defendants BTR, HAMILTON-KENT and SORBOTHANE have, at all material times, held a non-exclusive license for the manufacture of Sorbothane products for sale in the United States.

13. Plaintiffs are informed and believe that at all material times, defendant SORBOTHANE, INC. has, consistent with its license to manufacture Sorbothane in the United States, been involved in the manufacture and nationwide distribution of Sorbothane for all commercial, industrial and medical uses.

14. Sorbothane is a high shock absorbency polymer material which has been demonstrated to be extremely effective in diverse applications. Sorbothane has received nationwide acclaim and attention for its shock absorbent properties.

15. Sorbothane was first introduced into the United States market in or about July 1980 through BTR's division, HAMILTON-KENT. To date, the most commercially successful application of the product is in the manufacture of sporting shoe innersole and heel inserts including shoe inserts sold by shoe manufacturers (such as Nike) as part of the innersole of the shoes. Other Sorbothane products, some of which are on the market and some of which are still in the development stage, include medical products, miscellaneous industrial applications and horseshoe pads.

16. The "shoe insert" market for Sorbothane has experienced considerable growth since its introduction into the U.S. market and plaintiffs are informed and believe that the shoe insert market is presently in excess of $5.5 million in gross sales nationwide. At the present time, SORBOTHANE, INC. has approximately 90% to 95% of the market for polymer shock absorbent sporting shoe inserts. Most major manufacturers of sporting shoes (Nike, Addidas, New Balance, Tiger, Musak, Converse and Brooks) manufacture shoe inserts designed primarily for use with or as replacement inserts for shoes marketed by them. With the exception of Nike (which uses Sorbothane for its inserts) these products are not made from polymer materials and lack the shock absorbent properties of Sorbothane. Non-polymer inserts are not properly included in the same product market as Sorbothane inserts.

17. Because Sorbothane is a patented material which has received wide acclaim for its shock absorbent properties, Sorbothane inserts are perceived as unique and desirable as a supplement to or replacement for shoe inserts sold with sporting shoes or as an insert for shoes with no other innersole or heel insert.

18. Sorbothane shoe inserts are sold in sporting goods stores, shoe stores carrying sport and training shoes, department stores carrying sport and training shoes and general or "box-shoe" type retail outlets. Sorbothane is also sold as "sheet stock" for adaptation to various uses by the purchaser.

19. As of August 1983, plaintiffs had developed a substantial volume of business for Sorbothane shoe inserts and sheet stock primarily with retail accounts in the southwestern United States. Gross sales were approximately $303,000 for the first eight months of 1983 and would have averaged approximately $45,000 to $60,000 per month for January through August 1983 had non-defective product been made available to plaintiffs in sufficient quantities.

BACKGROUND FACTS

20. Beginning sometime in or about October 1980, the exact date being unknown to the plaintiffs, and continuing to the present time, defendants and others knowingly entered into and participated in a continuing conspiracy and unlawful combination in unreasonable restraint of trade and commerce in violation of sections 1 and 2 of the Sherman Act (title 15 U.S.C. §§1 and 2) and section 3 of the Clayton Act (title 15 U.S.C. §14).

21. In or about October, 1980, plaintiff SHIRLEY McQUILLAN became aware of the existence of Sorbothane and met with Maurice Hiles (who was

represented as a BTR representative and the inventor of the product) and representatives of HAMILTON-KENT. As a result of this meeting, plaintiff SHIRLEY McQUILLAN and defendant HAMILTON-KENT entered into an agreement providing for the development by plaintiff SHIRLEY McQUILLAN of horseshoe pads and other equestrian products developed from Sorbothane. From that point forward and until approximately February 1983, plaintiff SHIRLEY McQUILLAN spent a considerable amount of time, energy and money in the development of an equestrian application for Sorbothane.

22. In or about January 1981 through August 1981, HAMILTON-KENT, through defendant KENNETH M. LEIGHTON, represented to plaintiffs that it was developing its plan for the promotion and distribution of products to be manufactured from Sorbothane. As a result of her interests in the equestrian uses of the product and based on her contacts with representatives of HAMILTON-KENT and the inventor of the product, plaintiff SHIRLEY McQUILLAN participated in discussions with representatives of HAMILTON-KENT to become a distributor for all other Sorbothane products in a specified region of the southwestern portion of the United States.

23. In or about August, 1981 defendant HAMILTON-KENT entered into an oral agreement with plaintiff SHIRLEY McQUILLAN whereby SHIRLEY McQUILLAN was designated as the exclusive distributor for the southwestern United States for Sorbothane products. The essential terms of the agreement were as follows:

a. Plaintiff SHIRLEY McQUILLAN was to have the exclusive right to distribute Sorbothane products then contemplated for the United States

market in the Southwestern United States territory consisting of Southern California, New Mexico, Arizona, Colorado and parts of Nevada. HAMILTON-KENT was to provide support and assistance to SHIRLEY McQUILLAN to accomplish the goals shared by both HAMLITON-KENT and plaintiff SHIRLEY McQUILLAN of developing a market for Sorbothane products and developing and enhancing the positive reputation for Sorbothane.

b. In exchange, plaintiff SHIRLEY McQUILLAN agreed to use her best efforts to develop the market for Sorbothane products within her territory and to spend such time, energy and money as was necessary and appropriate to develop the retail market for Sorbothane products and promote and sell Sorbothane throughout her territory.

c. SHIRLEY McQUILLAN was initially advised that she would remain as a distributor in her territory for so long as she was using her best efforts to carry out her responsibilities as a distributor in a satisfactory way. After some discussion, the agreement evolved to provide for an initial term of five years renewable for five-year periods, at the election of plaintiff SHIRLEY McQUILLAN, provided her performance as a distributor was satisfactory. KENNETH M. LEIGHTON represented that a written agreement embodying the terms of the distributorship would be prepared and presented to her for execution.

24. In or about the second half of 1981, HAMILTON-KENT was in the process of establishing a nationwide distribution system for Sorbothane products by the creation of independent regional distributors under agreements similar to the agreement entered into with SHIRLEY McQUILLAN. Plaintiffs are informed

and believe that as of January 1982, the distribution system for Sorbothane was in place with a total of five distributors (including plaintiff SHIRLEY McQUILLAN) each of which commenced operation under an oral agreement with HAMILTON-KENT for the distribution of its products in a specified geographical territory. One of those distributors was defendant KENNETH B. LEIGHTON, who had resigned from his position as a vice-president of HAMILTON-KENT and had formed a corporation then known as Ohio Cushions (now SPECTRUM SPORTS) for the purpose of distributing Sorbothane products in a territory of approximately 30 states.

25. In or about August 1981, plaintiffs SHIRLEY McQUILLAN and LARRY McQUILLAN commenced doing business under the name SORBOTURF ENTERPRISES and plaintiff SORBOTURF ENTERPRISES acted, with the consent of HAMILTON-KENT, as the distributor for the southwestern United States territory under the oral agreement referred to in paragraph 23 hereinabove.

26. At all times material, and up to the wrongful termination of plaintiffs' distributorship in or about August 1983, plaintiffs performed all conditions and covenants on their part to be performed in accordance with the distributorship agreement referred to hereinabove, and did invest substantial time, energy and money to develop a market for Sorbothane products and promote and sell Sorbothane and did use their best efforts to carry out their responsibilities in accordance with the various specific policies and guidelines established from time to time by HAMILTON-KENT and SORBOTHANE.

27. As of at least the date of the consummation of the oral agreement designating plaintiffs as the southwestern United States distributor for Sorbothane products, and continuing until the present, defendants, and each of them, along with others including a company known as I.E.M. Orthopedics, which was appointed distributor for medical Sorbothane products, have knowingly entered into and participated in a continuing combination and conspiracy in unreasonable restraint of trade in violation of the Sherman Act and the Clayton Act by engaging in conduct designed to accomplish the following anti-competitive goals: (1) to establish and maintain resale prices for Sorbothane products at both the wholesale and retail levels; (2) to eliminate all independent distributors of Sorbothane athletic products except for a co-conspirator, defendant SPECTRUM SPORTS, INC., and to establish SPECTRUM SPORTS, INC. as the sole and exclusive nationwide distributor for Sorbothane sporting shoe products and sheet stock in order to establish and maintain resale prices for Sorbothane products at both the wholesale and retail levels; (3) to fix prices and allocate markets and territories among distributors so as to eliminate price competition for Sorbothane products and artificially inflate and support the price of certain Sorbothane products (such as medical products); (4) to enforce minimum price schedules and eliminate retailers who refused to conform to price schedules and anti-discounting policies dictated by members of the conspiracy; (5) to use the distributors to establish markets for Sorbothane products in their respective distribution territories and after markets were sufficiently developed, to terminate distribution agreements with the distributors, refuse to sell Sorbothane products to plaintiffs and deliver their

territories to co-conspirators, SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON; (6) to enforce exclusive dealing arrangements whereby distributors were precluded from dealing in competitors' products; and (7) to monopolize and/or attempt to monopolize the market for polymer shock absorbent shoe inserts and sheet stock and the sub-market for the distribution of Sorbothane shoe inserts and sheet stock nationwide.

28. In addition, defendants BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, SORBOTHANE, INC. and KENNETH M. LEIGHTON have, since at least July 1980, knowingly entered into and participated with each other and with others including the Leyland and Birmingham Rubber Company, Ltd., BTR Marketing Company, BTR Kennon, Sanshin Enterprises, and BTR Development Services, Ltd., in a continuing contract combination and conspiracy in unreasonable restraint of trade in violation of the Sherman Act, by engaging in the following conduct: (1) the allocation of world markets for the sale of Sorbothane products; (2) the imposition of restrictions on the sale of Sorbothane products from and into the United States by members of the conspiracy; (3) the boycotting of potential purchasers of Sorbothane products who fail to comply with unreasonable resale restrictions imposed for anticompetitive purposes; (4) the fixing of prices for Sorbothane products; (5) the elimination of competitors and potential competitors by coercing the patent holder to withhold the granting of additional licenses to manufacture Sorbothane; (6) the boycotting of suppliers of members of the conspiracy and engaging in other coercive conduct designed to cause suppliers to refuse to supply materials to non-members of the conspiracy; (7) the threatening patent infringement litigation to anyone who attempts to manufacture a

polymer shock absorbent material in order to discourage competitors and potential competitors; and (8) monopolizing, attempting to monopolize and conspiring to monopolize the market for the manufacture and sale of Sorbothane products worldwide.

29. In furtherance of the combination and conspiracy referred to in paragraph 27, defendants, and each of them, engaged in the following acts among others:

a. Intentionally misrepresenting to plaintiffs that plaintiffs would be given a distributorship for Sorbothane products if they agreed to develop the market in their territory and that they would remain as the distributor in their region for so long as they performed satisfactorily and used their best efforts to carry out their responsibilities as distributors;

b. Intentionally misrepresenting to plaintiffs that a written distributorship agreement embodying the essential terms and conditions agreed upon would be promptly prepared and executed by HAMILTON-KENT;

c. Establishing wholesale prices to be charged by distributors to retail outlets and insisting that distributors not set prices below the published price list or permit volume discounts or other price incentives;

d. Requiring distributors, as a condition to maintaining their distributorship, to police retailers to insure that retailers were not engaging in price cutting or discounting in violation of established retail prices set by defendants;

e. Prohibiting distributors from selling Sorbothane products to discount stores or other prohibited retail outlets;

f. Prohibiting distributors from dealing in competitors' products;

g. Engaging in conduct intended to frustrate distributors and cause distributors to relinquish their distributorship after a market had been developed within their territory including, without limitation, the following specific acts:

i. Setting quotas unrealistically high and misrepresenting the sales volume achieved by other distributors in order to support unreasonably high quotas;

ii. Raising prices to distributors without sufficient notice preventing distributors from passing on those price increases to their customers;

iii. Pressuring distributors to sell their distributorships to defendant SPECTRUM SPORTS, INC.;

iv. Misrepresenting their intention not to engage in arm's length negotiations for the acquisition of plaintiffs' distributorship;

v. Engaging in threats and intimidation designed to coerce plaintiffs to sell their distributorship to SPECTRUM SPORTS, INC.;

vi. Eliminating products from the product line of the regional distributors and creating national distributions for these products (*i.e.*, medical products, "box shoe" products and military products); and

vii. Establishing highly restrictive credit terms for the purchase of Sorbothane products.

h. Intentionally shipping defective products;

i. Misrepresenting their intent to grant plaintiffs an exclusive distributorship for equestrian products;

j. Fabricating complaints with the performance of plaintiffs under plaintiffs' distributorship with HAMILTON-KENT and SORBOTHANE, INC.;

k. Threatening to terminate plaintiffs from their distributorship if they dealt in competitors' products;

l. Refusing to negotiate in good faith for the consummation of a written distributorship agreement;

m. Systematically reducing each distributor's product line by introducing exclusive nationwide distributors for certain markets and ultimately terminating each of the distributors for Sorbothane sporting shoe and sheet stock products and delivering to SPECTRUM SPORTS, INC. the territories serviced by each such distributor until SPECTRUM SPORTS, INC. was the sole and exclusive distributor for Sorbothane sporting shoe and sheet stock products;

n. Allocating markets between distributors (such as I.E.M. Orthopedics and the athletic products distributors) so as to reduce competition at the wholesale level and support the fixed price for certain Sorbothane products (such as medical products);

o. Wrongfully terminating the distributorship of plaintiffs and refusing to sell Sorbothane products to plaintiffs from and after August 1983;

p. Misrepresenting their intention regarding the acquisition and confidentiality of the customer lists of plaintiffs;

q. Delivering plaintiffs' confidential customer list to defendants SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON.

30. In furtherance of the contract combination and conspiracy referred to in paragraph 28, defendants BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, SORBOTHANE, INC. and KENNETH M. LEIGHTON engaged in the following additional acts in concert with each other and with the other members of the conspiracy referred to in paragraph 28;

a. Allocating world markets for the sale of Sorbothane products;

b. Restricting sales into and out of the United States by members of the conspiracy;

c. Engaging in secondary group boycotts of suppliers who failed to comply with anti-competitive restrictions;

d. Engaging in primary group boycotts of purchasers and potential purchasers of Sorbothane products who failed to comply with resale restrictions;

e. Entering into and enforcing horizontal price fixing agreements;

f. Threatening baseless litigation to deter and frustrate competitors;

g. Coercing the patent holder to restrict sublicenses in order to further the unlawful goals of the conspiracy and to perpetrate the monopoly on polymer shock absorbent products held by members of the conspiracy in their respective markets.

FIRST COUNT

(Conspiratorial Refusal to Deal, Resale Price Maintenance and Exclusive Dealing [Section 1 of the Sherman Act] [Against All Defendants])

31. Plaintiffs refer to paragraphs 1 through 29 above and by this reference thereto, incorporate the same as though herein set forth at length.

32. The relevant geographic market is the United States and the relevant product markets are polymer shock absorbent sporting shoe inserts and sheet stock. Sorbothane shoe inserts and sheet stock is a relevant product sub-market.

33. The foregoing conspiracy in restraint of trade and actions taken in furtherance of the conspiracy occurred in the interstate commerce of the United States.

34. Plaintiffs have been injured in their business and property by reason of defendants' conspiracy in violation of section 1 of the Sherman Act in that plaintiffs have lost their distributorship and have suffered and continue to suffer loss of profits, revenues and other income and loss of goodwill and damage to their reputation as a result of the termination of their distributorship and as a direct and proximate result of the wrongful conduct of defendants as alleged hereinabove.

SECOND COUNT

(Group Boycott, Horizontal Price Fixing, Horizontal Market Allocation [Section 1 of the Sherman Act] [Against Defendants BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, SORBOTHANE, INC. and KENNETH M. LEIGHTON])

35. Plaintiffs refer to paragraphs 1 through 32 above and by this reference thereto incorporate the same as though herein set forth at length.

36. By the acts described in paragraphs 28 through 30 above, *inter alia*, BTR, INC., SORBOTHANE, INC., HAMILTON-KENT MANUFACTURING COMPANY and KENNETH M. LEIGHTON, in concert with each other and with others, including BTR Kennon, Leyland and Birmingham Rubber Company, Ltd., BTR Development Services, Ltd., Sanshin Enterprises and BTR Marketing Company, have engaged in an unlawful contract combination and conspiracy in unreasonable restraint of trade in violation of section 1 of the Sherman Act.

37. The foregoing conspiracy in restraint of trade and actions taken in furtherance of the conspiracy occurred in the Interstate and Foreign Commerce of the United States.

38. Plaintiffs have been injured in their business and property by reason of defendants' conspiracy in violation of section 1 of the Sherman Act in that plaintiffs have lost their distributorship and have suffered and continue to suffer loss of profits, revenues and other income and loss of goodwill and damage to their reputation as a result of the termination of their distributorship and as a direct and proximate result of the wrongful conduct of defendants as alleged hereinabove.

THIRD COUNT

(Monopolization [Section 2 of the Sherman Act] [Against All Defendants])

39. Plaintiffs refer to paragraphs 1 through 30 above and by this reference thereto incorporate the same as though herein set forth at length.

40. By the acts described in paragraph 27 through 30 above, *inter alia*, defendants and other co-conspirators have intended to and have monopolized, conspired to monopolize or have attempted to monopolize and are now monopolizing, conspiring to monopolize or attempting to monopolize the markets for the manufacture and distribution to retail outlets of polymer shock absorbent sporting shoe inserts and sheet stock and the sub-market for Sorbothane sporting shoe inserts and sheet stock.

41. Because of their substantial resources and market power, defendants have a dangerous probability of success in their attempt to monopolize the markets for the manufacture and distribution of polymer shock absorbent sporting shoe inserts and Sorbothane shoe inserts to retail outlets.

42. Plaintiffs have been injured in their business and property by reason of defendants' monopolization, conspiracy to monopolize or attempt to monopolize the market and sub-market referred to in paragraph 30 above in that plaintiffs have lost their distributorship and have suffered loss of profits, revenues and other monies from the termination of their distributorship and loss of goodwill and damage to their reputation as a direct and proximate result of defendants' monopolization, conspiracy to monopolize or attempt to monopolize as alleged hereinabove.

FOURTH COUNT

(Exclusive Dealing [Section 3 of the Clayton Act] [Against All Defendants])

43. Plaintiffs refer to paragraphs 1 through 30 above and by this reference thereto incorporate the same as though herein set forth at length.

44. At all times material, defendants BTR and SORBOTHANE insisted that distributors of Sorbothane products, including plaintiffs, refrain from dealing in the products of competitors as a condition for maintaining their distributorship.

45. On or about June 3, 1983, and approximately two months prior to the wrongful termination of plaintiffs' distributorship, defendants SORBOTHANE, INC. and KENNETH M. LEIGHTON commented on plaintiffs' purported discussions with a competitor of SORBOTHANE, INC. and demanded an explanation of those discussions.

46. By letter dated August 1, 1983, SORBOTHANE, INC. purported to terminate plaintiffs as distributors of Sorbothane products because, *inter alia*, plaintiffs were engaging in discussions with a competitor of SORBOTHANE, INC. and because plaintiffs refused to conform to the agreement to fix wholesale and retail prices.

47. Plaintiffs have been injured in their business and property by reason of defendants' conspiracy in violation of section 3 of the Clayton Act in that plaintiffs have lost their distributorship and have suffered and continue to suffer loss of profits, revenues and other income and loss of goodwill and damage their reputation as a result of the termination of their distributorship and as a direct and proximate result of the wrongful conduct of defendants as alleged hereinabove.

FIFTH COUNT

(Breach of Oral Contract [Against Defendants BTR, INC., HAMILTON-KENT and SORBOTHANE, INC.])

48. Plaintiffs refer to paragraphs 1 through 30 above and by this reference thereto incorporate the same as though herein set forth at length.

49. In or about August, 1981, defendant BTR, INC., through its division, agent and alter ego, HAMILTON-KENT, and plaintiff SHIRLEY McQUILLAN entered into an oral agreement wherein plaintiff SHIRLEY McQUILLAN was designated as the distributor for Sorbothane products in the Southwestern United States which territory included Southern California, New Mexico, Arizona, Colorado and a portion of Nevada. The essential terms of the oral agreement are set forth in paragraph 23 above. Thereafter, plaintiffs SHIRLEY McQUILLAN and LARRY McQUILLAN formed SORBOTURF ENTERPRISES for the purpose of carrying out the business of the distribution of Sorbothane products. At all times material, plaintiffs conducted the business of distributor of Sorbothane products under the terms and conditions of the oral agreement with defendants BTR, SORBOTHANE, INC. and HAMILTON-KENT and with the knowledge and consent of said defendants. Plaintiffs have performed all conditions and covenants on their part to be performed under the subject oral agreement.

50. Despite repeated representations to the effect that a written agreement would be prepared embodying the oral distributorship agreement, and despite the submission of a proposed written agreement by plaintiffs, defendants have failed and refused to enter into a written distributorship agreement embodying the terms of the oral agreement although at all times material, defendants BTR, SORBOTHANE, INC. and HAMILTON-KENT have accepted the performance of plaintiffs under the oral agreement, have induced

plaintiffs to perform under the oral agreement, and have caused plaintiffs to change their position and to expend considerable sums of money and amounts of time and energy on the representation that plaintiffs had a valid distributorship of Sorbothane products and that the oral agreement would be reduced to writing.

51. At all times material, plaintiffs relied upon the representations regarding their status as distributor.

52. On or about August 1, 1983, defendants BTR, HAMILTON-KENT and SORBOTHANE, INC. breached the oral agreement by purporting to terminate plaintiffs' status as a distributor of Sorbothane products and by refusing to continue to supply Sorbothane products as a distributor and by designating SPECTRUM SPORTS, INC. as the exclusive national distributor for Sorbothane sporting shoe inserts and sheet stock and supplying SPECTRUM SPORTS, INC. with Sorbothane products and a copy of plaintiff's confidential customer list to enable SPECTRUM SPORTS to commence sales in plaintiffs' exclusive territory.

53. As a direct and proximate result of said defendants' breach of contract as aforesaid, plaintiffs have been damaged in the loss of their distributorship and the loss of revenues and profits and the destruction of their valuable business as a distributor of Sorbothane products.

SIXTH COUNT

(Fraud [Against Defendants BTR, HAMILTON-KENT, SORBOTHANE, INC., KENNETH M. LEIGHTON, KENNETH B. LEIGHTON and SPECTRUM SPORTS, INC.])

54. Plaintiffs refer to paragraphs 1 through 30 above and by this reference thereto incorporate the same as though herein set forth at length.

55. In or about January 1984, plaintiffs first discovered that defendants BTR, HAMILTON-KENT, SORBOTHANE, INC., KENNETH M. LEIGHTON, acting as an individual and president and officer of defendants HAMILTON-KENT and SORBOTHANE, INC., and KENNETH B. LEIGHTON, acting as an individual and president and officer of SPECTRUM SPORTS, INC., perpetrated and conspired to perpetrate a fraudulent scheme against plaintiffs that began in or about October 1980, and has continued through the present.

56. The fraudulent scheme and conspiracy included, among other things, the following:

a. In or about October 1980, said defendants, through KENNETH M. LEIGHTON, and Laurene Heinsohn, as marketing manager of HAMILTON-KENT and SORBOTHANE, INC., falsely represented to plaintiff SHIRLEY McQUILLAN that SHIRLEY McQUILLAN would be designated as the exclusive distributor of equestrian products developed from Sorbothane if she would devote her time, money and energy in the development of prototype equestrian products and in the development of a market for such products;

b. In or about the fall of 1981, defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented to plaintiff SHIRLEY McQUILLAN that she was the exclusive distributor for Sorbothane products in the southwestern territory and that so long as she properly discharged her

responsibilities as distributor and used her best efforts to promote and develop the retail market for Sorbothane products, she would remain as distributor for Sorbothane products within her territory.

c. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented to plaintiffs that SORBOTHANE, INC. and HAMILTON-KENT would provide cooperation and assistance to plaintiffs in the development of a retail market for Sorbothane products within plaintiffs' territory.

d. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented to plaintiffs that as new products were developed, plaintiffs would have the exclusive right to distribute such products in their territory.

e. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented to plaintiffs that as distributors, plaintiffs would be treated equally and fairly with other distributors as to credit terms, priority of supply of shipments of Sorbothane products, allocation of territories, allocation of funds for national advertising and other activities engaged in by SORBOTHANE, INC. and HAMILTON-KENT for the benefit of the development of the national market;

f. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented to plaintiffs that the establishment of sales quotas were fair and based on accurate information and falsely represented the extent of sales by other distributors for purposes of supporting unrealistically high sales quotas;

g. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented that plaintiffs' distributorship would not be unreasonably interfered with or terminated;

h. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn and KENNETH B. LEIGHTON, falsely represented that plaintiffs should sell their distributorship to SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON so that plaintiffs could be given the nationwide distributorship for equestrian products;

i. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented that customer lists must be provided to HAMILTON-KENT AND SORBOTHANE, INC. for purposes of said defendants protecting the interests of all distributors and preventing the improper sales by other distributors into plaintiffs' territory and that such customer lists would be kept confidential and would not be given to other distributors or used to take over plaintiffs' retail accounts.

57. These representations, at the times made, were false and fraudulent and designed to induce plaintiffs to continue to invest their time, money and energy in the development of markets for Sorbothane products and in the development of prototype products for equestrian use and to turn over customer lists to defendants. In truth and in fact, defendants had, at the time of the making of said representations, formed a plan to induce plaintiffs to develop equestrian products and prototypes and to develop the market for Sorbothane products in the southwestern United States with the intent of ultimately, without cause, terminating their distributorship and the continued right to distribute

Sorbothane products within the territory of the plaintiffs and absorbing that territory into the sales territory of SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON. Defendants had no intention of designating plaintiffs as the exclusive nationwide distributor for equestrian products and fully intended to intimidate, harass and interfere with the ability of the plaintiffs to continue their business as a distributor in order to cause plaintiffs to abandon their distributorship or to sell it to SPECTRUM SPORTS, INC. for less than its value. Defendants further intended to employ tactics to discourage and frustrate plaintiffs in the conduct of their business including, without limitation, the manipulation of credit terms and sales quotas, the arbitrary changing of prices, the shipment of defective product, the failure to provide sufficient quantities of product, the misuse of national advertising monies to the disadvantage of plaintiffs, the diversion of plaintiffs' customer lists and ultimately the wrongful termination of plaintiffs' right to continue to sell Sorbothane products.

58. At the time the representations referred to in paragraph 56 were made, plaintiffs were ignorant of the falsity of said representations, but believed them to be true. In reliance on the truth of said representations, plaintiffs invested considerable time, money and energy in the development of markets for Sorbothane products and in the development of prototype products for equestrian use and delivered to HAMILTON-KENT and SORBOTHANE, INC. a list of their customers for Sorbothane products, which list was ultimately delivered to SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON.

59. As a proximate result of the fraudulent actions of defendants as aforesaid, plaintiffs have been damaged by the loss of their distributorship and the loss of

revenues and income and the valuable and exclusive rights to market Sorbothane products within their territory and the exclusive right to market Sorbothane equestrian products nationwide and by the disclosure of their customer list to a competitor, SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON.

60. The actions of said defendants, and each of them, were done maliciously, oppressively and fraudulently and with the intent to injure and harass plaintiffs so as to justify an award of punitive and exemplary damages in the sum of $5 million to punish and make an example of these defendants.

SEVENTH COUNT

(Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(c) [Against Defendants BTR, SORBOTHANE, INC., HAMILTON-KENT, SPECTRUM SPORTS, KENNETH M. LEIGHTON and KENNETH B. LEIGHTON])

61. Plaintiffs refer to paragraphs 1 through 30 and 55 through 60 above and by this reference thereto, incorporate the same as though herein set forth at length.

62. Each of the plaintiffs is a "person" within the meaning of 18 U.S.C. section 1964(c).

63. Each of the defendants is a "person" within the meaning of 18 U.S.C. section 1961(3).

64. At all material times, defendant BTR was an "enterprise" engaged in, or the activities of which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

65. At all material times, defendant SORBOTHANE, INC. was an "enterprise" engaged in, or the activities of which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

6. At all material times, defendant HAMILTON-KENT was an "enterprise" engaged in, or the activities of which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

67. At all material times, defendant SPECTRUM SPORTS, INC. was an "enterprise" engaged in, or the activities of which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

68. At all material times, plaintiff SORBOTURF ENTERPRISES was an "enterprise" engaged in, or the activities of which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

69. By engaging in the conduct described hereinabove in the fifth count, defendants, and each of them, engaged in a pattern of "racketeering activity" within the meaning of 18 U.S.C. section 1961(1) specifically including, without limitation, acts indictable under title 18 U.S.C. section 1341 in that, in consummating the fraudulent schemes, acts and omissions described hereinabove, defendants, and each of them, did knowingly and willfully cause letters or other mailable items to be sent and delivered by means of the United States mail and receive letters and other mailable matters through the United States mail all as prohibited by 18 U.S.C. section 1341.

70. Specific examples of the use of the mails for the consummation of the fraudulent schemes, acts and omissons described hereinabove are as follows:

Date	*Item*
a. August 1, 1983	Letter from KENNETH M. LEIGHTON to SORBOTURF ENTERPRISES purporting to terminate distributorship.
b. March 1, 1983	Letter from KENNETH M. LEIGHTON to SORBOTURF ENTERPRISES discussing purported distribution of Sorbothane products through I.E.M. and Intermark.
c. February 16, 1983	Letter from SORBO, INC. to SORBOTURF ENTERPRISES discussing new distribution system and reiterating request for customer lists.
d. December 7, 1982	Letter from SORBO, INC. to SORBOTURF ENTERPRISES establishing national advertising budget for 1983 and requesting SORBOTURF ENTERPRISES' contribution to that budget.
e. October 28, 1982	Letter from SORBO, INC. to SORBOTURF ENTERPRISES demanding customer list of SORBOTURF ENTERPRISES and threatening change in distribution system "such as in-house sales force."
f. July 2, 1982	Letter from SORBO, INC. to Shirley McCone [MCQUILLAN] re selling SORBOTURF

	ENTERPRISES to KENNETH B. LEIGHTON and representing that McCone would not get equestrian market because she would not give up SORBOTURF ENTERPRISES.
g. January 6, 1982	Letter from HAMILTON-KENT to "Dear Distributors" re establishing national medical products distribution.
h. January 27, 1981	Letter from HAMILTON-KENT to Ms. McCone re intent to designate Ms. McCone as distributor for Sorbothane in the Southwest and submit distributors' contract within "two to three weeks."
i. July 23, 1982	Letter from SORBO, INC. to SORBOTURF ENTERPRISES requesting monthly reports including customer lists.
j. February 17, 1982	Letter from HAMILTON-KENT to "Dear Distributors" representing sales forecasts and setting performance level quota for SORBOTURF ENTERPRISES.
k. Undated	Letter from SORBO, INC. to SORBOTURF ENTERPRISES explaining purported reasons for demanding customer lists.

71. Each of the foregoing letters was sent in furtherance of the fraudulent scheme referred to hereinabove in that each constitutes a fraudulent misrepresentation or an action or notice of action consummating the fraudulent scheme.

72. Defendants SORBOTHANE, INC., HAMILTON-KENT, SPECTRUM SPORTS, INC., KENNETH M. LEIGHTON and KENNETH B. LEIGHTON, and each of them, are employed by or are associated with BTR, an enterprise, and have conducted or participated, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c).

73. Defendants BTR, HAMILTON-KENT, SPECTRUM SPORTS, INC., KENNETH M. LEIGHTON, and KENNETH B. LEIGHTON, and each of them, are employed by or are associated with SORBOTHANE, INC., an enterprise, and have conducted or participated, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c).

74. Defendants BTR, SORBOTHANE, INC., SPECTRUM SPORTS, INC., KENNETH M. LEIGHTON, and KENNETH B. LEIGHTON, and each of them, are employed by or are associated with HAMILTON-KENT, an enterprise, and have conducted or participated, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c).

75. Defendants, BTR, SORBOTHANE, INC., HAMILTON-KENT, KENNETH M. LEIGHTON and KENNETH B. LEIGHTON, and each of them, are employed by or are associated with SPECTRUM SPORTS, INC., an enterprise, and have conducted or participated, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c).

76. As a direct and proximate result of defendants' violations of 18 U.S.C. section 1962(c), plaintiffs have been injured in their business and property in that plaintiffs have lost their distributorship and have suffered and continue to suffer loss of profits and revenues, and other income as a result of the loss of their distributorship and as a direct and proximate result of the wrongful conduct and have lost the value of their investment in money, time and energy.

EIGHTH COUNT

(Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(a) [Against Defendants BTR, SORBOTHANE, INC., HAMILTON-KENT, KENNETH M. LEIGHTON and KENNETH B. LEIGHTON])

77. Plaintiffs refer to paragraphs 1 through 30, 55 through 60 and 62 through 76 above and by this reference thereto incorporate the same as though herein set forth at length.

78. Defendants BTR, SORBOTHANE, INC., HAMILTON-KENT, KENNETH M. LEIGHTON and KENNETH B. LEIGHTON, and each of them, have received income derived, directly or indirectly, from a pattern of racketeering activity, and have used or invested, directly or indirectly, such income, or the

proceeds of such income, in the acquisition of an interest in, or the establishment or operation of, SPECT' 'M SPORTS, INC., an enterprise which is engaged in, or the activities of which affect interstate commerce in violation of 18 U.S.C. section 1962(a).

79. As a direct and proximate result of said defendants' violations of 18 U.S.C. section 1962(a), plaintiffs have sustained injury to their business and property in that plaintiffs have lost their distributorship and have suffered and continue to suffer loss of profits and revenues, and other income as a result of the loss of their distributorship and as a direct and proximate result of the wrongful conduct and have lost the value of their investment in money, time and energy.

NINTH COUNT

(Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(b) [Against Defendants BTR, SORBOTHANE, INC., HAMILTON-KENT, SPECTRUM SPORTS, INC., KENNETH B. LEIGHTON and KENNETH M. LEIGHTON])

80. Plaintiffs refer to paragraphs 1 through 30, 55 through 60, 62 through 76, and 78 and 79 above and by this reference thereto incorporate the same as though herein set forth at length.

81. Defendants, and each of them, have, through a pattern of racketeering activity, acquired and maintained ownership and control over the business and customer accounts of plaintiffs SORBOTURF ENTERPRISES, an enterprise which is engaged in or which affects interstate commerce in violation of 18 U.S.C. section 1962(b).

82. As a direct and proximate result of defendants' violations of 18 U.S.C. section 1962(b), plaintiffs have sustained injury to their business and property in that

plaintiffs have lost their distributorship and have suffered and continue to suffer loss of profits and revenues, and other income as a result of the loss of their distributorship and as a direct and proximate result of the wrongful conduct and have lost the value of their investment in money, time and energy.

TENTH COUNT

(Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(d) [Against Defendants BTR, HAMILTON-KENT, SORBOTHANE, INC., SPECTRUM SPORTS, KENNETH M. LEIGHTON and KENNETH B. LEIGHTON])

83. Plaintiffs refer to paragraphs 1 through 30, 51 through 55, 62 through 76, 78 through 79 and 81 and 82 above and by this reference thereto incorporate the same as though herein set forth at length.

84. Defendants, and each of them, alleged in the aforesaid violations of 18 U.S.C. section 1962(a), (b) and (c), and each of them, conspired among themselves and with each other to commit and conceal the aforesaid violations of 18 U.S.C. sections 1962(a), (b) and (c), and each of them, in violation of 18 U.S.C. section 1962(d).

85. As a direct and proximate result of defendants' violations of 18 U.S.C. section 1962(d), plaintiffs have sustained injury to their business and property in that plaintiffs have lost their distributorship and have suffered and continue to suffer loss of profits and revenues, and other income as a result of the loss of their distributorship and as a direct and proximate result of the wrongful conduct and have lost the value of their investment in money, time and energy.

ELEVENTH COUNT

(Bad Faith Breach of the Implied Covenant of Good Faith and Fair Dealing [Against Defendants BTR, HAMILTON-KENT and SORBOTHANE, INC.])

86. Plaintiffs refer to paragraphs 1 through 30, 49 through 53, and 55 through 60 above and by this reference thereto incorporate the same as though herein set forth at length.

87. Implied in every contract is a covenant of good faith and fair dealing requiring each party to act in good faith in the performance of his or her obligations thereunder and in his or her dealing with the other party to the contract.

88. Defendants BTR, HAMILTON-KENT and SORBOTHANE, INC., in addition to breaching the oral contract, seek to shield themselves, and each of them, from liability by denying, in bad faith and without probable cause, that the contract exists. By said conduct and the conduct referred to hereinabove, defendants BTR, HAMILTON-KENT and SORBOTHANE, INC. have breached the implied covenant of good faith and fair dealing.

89. As a direct and proximate result of said breach of the implied covenant of good faith and fair dealing, plaintiffs have been damaged in the loss of their distributorship and the loss of revenue and income and the valuable rights to market Sorbothane products and the exclusive right to market Sorbothane equestrian products nationwide.

90. The actions of said defendants, and each of them, were done maliciously, oppressively and fraudulently and with the intent to harass and injure plaintiffs so as to justify an award of punitive and exemplary damages in the amount of $5 million to punish and make an example of these defendants.

TWELFTH COUNT

(Unfair Competition [Against Defendants BTR, HAMILTON-KENT, SORBOTHANE, INC., KENNETH M. LEIGHTON, KENNETH B. LEIGHTON and SPECTRUM SPORTS, INC.])

91. Plaintiffs refer to paragraphs 1 through 30 and 55 through 60 hereinabove and by this reference thereto incorporate the same as though herein set forth at length.

92. The actions of said defendants, and each of them, as aforesaid, constitute unfair competition pursuant to California Business and Professions Code section 17200.

THIRTEENTH COUNT

(California Cartwright Act, Bus. & Prof. Code §16,600 and §16,700 [Against Defendants BTR, HAMILTON-KENT, SORBOTHANE, INC., KENNETH M. LEIGHTON, KENNETH B. LEIGHTON and SPECTRUM SPORTS, INC.])

93. Plaintiffs refer to paragraphs 1 through 30, 32 through 34, 36 through 38 and 40 through 42 and 44 through 47 hereinabove and by this reference thereto incorporate the same as though herein set forth at length.

94. The actions of said defendants, and each of them, as aforesaid, constitute a violation of the California Cartwright Act, Business and Professions Code section 16,600 and section 16,700.

95. Plaintiffs have been injured in their business and property by reason of defendants' conspiracy in violation of the California Cartwright Act in that plaintiffs have lost their distributorship and have suffered and continued to suffer loss of profits, revenues

and other income and loss of goodwill and damage to their reputation as a result of the termination of their distributorship and as a direct and proximate result of the wrongful conduct of defendants as alleged hereinabove.

FOURTEENTH COUNT

(Interference With Prospective Advantage [Against Defendants BTR, HAMILTON-KENT, SORBOTHANE, INC., KENNETH M. LEIGHTON, SR., KENNETH B. LEIGHTON, JR. and SPECTRUM SPORTS, INC.])

96. Plaintiffs refer to paragraphs 1 through 30, 49 through 52 and 55 through 58 above and by this reference thereto incorporate the same as though herein set forth at length.

97. The actions of defendants, and each of them, as aforesaid, were wrongful and were known by them, and each of them, to result in plaintiffs' loss of numerous retail accounts and the interference with plaintiffs' valuable economic relationship with their retail customers thereby constituting interference with contract and interference with prospective advantage.

FIFTEENTH COUNT

(Conversion [Against Defendants BTR, HAMILTON-KENT, SORBOTHANE, INC. and KENNETH M. LEIGHTON])

98. Plaintiffs refer to paragraphs 1 through 30 hereinabove and by this reference thereto incorporate the same as though set forth at length.

99. Plaintiffs developed a prototype horseshoe pad using Sorbothane products and developed a marketing plan for the development of the equestrian market for

horseshoe pads and provided said prototype product and marketing plan to defendants BTR, HAMILTON-KENT and SORBOTHANE, INC. and KENNETH M. LEIGHTON. Said property was presented to defendant KENNETH M. LEIGHTON on the express representation by KENNETH M. LEIGHTON that plaintiffs would be appointed the exclusive distributor of Sorbothane equestrian products nationwide. Thereafter, these defendants converted plaintiffs' property to their own use, refused to appoint plaintiffs as the exclusive distributor of Sorbothane in the equestrian market and instead used plaintiffs' property to create a distributorship for defendant KENNETH M. LEIGHTON and others under the corporate name of Sterivet Laboratories, Inc.

WHEREFORE, plaintiffs pray for judgment against defendants as follows:

ON COUNTS ONE, THREE AND FOUR

1. For damages for violation of sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act against defendants SORBOTHANE, INC., HAMILTON-KENT, BTR, INC., KENNETH M. LEIGHTON, KENNETH B. LEIGHTON and SPECTRUM SPORTS according to proof;

2. That said damages be trebled;

3. For attorneys' fees and expenses according to proof.

ON COUNT TWO

4. For damages for violation of Section 1 of the Sherman Act against defendants BTR, INC., SORBOTHANE, INC., HAMILTON-KENT, and KENNETH M. LEIGHTON according to proof;

5. That said damages be trebled;

6. For attorneys' fees and expenses according to proof.

ON COUNT FIVE

7. For damages for breach of contract against defendants BTR, INC., HAMILTON-KENT, and SORBOTHANE, INC. according to proof.

ON COUNT SIX

8. For damages for fraud against all defendants according to proof;

9. For punitive damages in the amount of $5 million dollars.

ON COUNTS SEVEN THROUGH TEN

10. For damages for violation of the Racketeer Influenced and Corrupt Practices Act against all defendants according to proof;

11. That said damages be trebled;

12. For attorneys' fees and expenses according to proof.

ON COUNT ELEVEN

13. For damages for breach of the covenant of good faith and fair dealing against defendants BTR, HAMILTON-KENT, and SORBOTHANE, INC. according to proof;

14. For punitive damages in the amount of $5 million dollars.

ON COUNT TWELVE

15. For damages for unfair competition against all defendants according to proof.

ON COUNT THIRTEEN

16. For damages and violations of the Cartwright Act, California Business and Professions Code section 16700 *et seq.*, against all defendants according to proof;

17. That said damages be trebled;

18. For attorneys' fees and expenses according to proof;

ON COUNT FOURTEEN

19. For damages for interference with prospective advantage against all defendants according to proof.

ON COUNT FIFTEEN

20. For damages for conversion against defendants BTR, INC., HAMILTON-KENT, SORBOTHANE, INC. and KENNETH M. LEIGHTON according to proof.

ON ALL COUNTS

21. For costs of suit herein incurred.

22. For such other and further relief as the court deems just and proper.

DATED: 7-21, 1986

JAMES F. STIVEN
JEFFREY M. SHOHET
ROBERT A. McGREGOR
By: /s/ JEFFREY M. SHOHET
Attorneys for Plaintiffs

Of Counsel:
GRAY, CARY, AMES & FRYE

JURY DEMAND

Plaintiffs demand a trial by jury on all claims and all issues.

DATED: 7-21, 1986

JAMES F. STIVEN
JEFFREY M. SHOHET
ROBERT A. MCGREGOR
By: /s/ JEFFREY M. SHOHET
Attorneys for Plaintiffs

Of Counsel:
GRAY, CARY, AMES & FRYE

Case No. 84-1585-E (CM)

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(Title omitted in printing)

ANSWER OF DEFENDANTS KENNETH B. LEIGHTON AND SPECTRUM SPORTS, INC. TO PLAINTIFF'S SECOND AMENDED COMPLAINT

(Filed August 13, 1986)

For their Answer to plaintiffs' Second Amended Complaint, defendants Kenneth B. Leighton and Spectrum Sports, Inc. ("Spectrum") state:

1. Admit the allegations set forth in paragraph 1 of the Second Amended Complaint.

2. Deny the allegations set forth in paragraph 2 of the Second Amended Complaint.

3. Admit the allegations set forth in paragraphs 3 and 4 of the Second Amended Complaint.

4. Admit Spectrum transacts business in this judicial district, but specifically deny Kenneth B. Leighton transacts his affairs in this judicial district and deny each and every other allegation set forth in paragraph 5 of the Second Amended Complaint.

5. Deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth in paragraphs 6, 7 and 8 of the Second Amended Complaint.

6. Admit the allegations set forth in paragraph 9 of the Second Amended Complaint.

7. Deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth in paragraph 10 of the Second Amended Complaint.

8. Admit Kenneth M. Leighton and Kenneth B. Leighton are father and son, respectively, and are residents of the State of Ohio, and further admit Kenneth B. Leighton was president of Spectrum at all material times, but deny, for want of knowledge sufficient to form a belief as to the truth thereof, the remaining allegations in paragraph 11 of the Second Amended Complaint.

9. Deny Kenneth B. Leighton and Spectrum were involved or participated in the combination or conspiracy alleged in paragraph 12 of the Second Amended Complaint and deny, for want of knowledge sufficient to form a belief as to the truth thereof, each and every other allegation set forth therein.

10. Deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth in paragraph 13 of the Second Amended Complaint.

11. Admit the allegations set forth in paragraphs 14 and 15 of the Second Amended Complaint.

12. Deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth in paragraphs 16 and 17 of the Second Amended Complaint, except that they specifically deny the allegation that Sorbothane inserts are perceived as unique.

13. Admit the allegations set forth in paragraph 18 of the Second Amended Complaint.

14. Deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth in paragraph 19 of the Second Amended Complaint.

15. Deny the allegations in paragraph 20 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth therein as they refer to the other defendants and non-parties to the action.

16. Deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth in paragraphs 21, 22 and 23 of the Second Amended Complaint.

17. Admit that in or about the second half of 1981, Hamilton Kent was in the process of establishing a distribution system for Sorbothane products, and admit the allegations in the last sentence of paragrah 24 of the Second Amended Complaint, but deny each and every other allegation set forth therein.

18. Deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth in paragraphs 25 and 26 of the Second Amended Complaint.

19. Deny each and every allegation contained in paragraphs 27, 28, 29 and 30 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

FIRST COUNT

20. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 29 of the Second Amended Complaint.

21. Deny the allegations in paragraph 32 of the Second Amended Complaint.

22. Deny Kenneth B. Leighton and Spectrum participated in the alleged conspiracy referred to in paragraph 33 of the Second Amended Complaint, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, the remaining allegations set forth therein.

23. Deny the allegations set forth in paragraph 34 of the Second Amended Complaint.

SECOND COUNT

24. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 32 of the Second Amended Complaint.

25. Deny the allegations set forth in paragraphs 36, 37 and 38 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

THIRD COUNT

26. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 30 of the Second Amended Complaint.

27. Deny the allegations set forth in paragraphs 40, 41 and 42 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants and non-parties to this action.

FOURTH COUNT

28. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 30 of the Second Amended Complaint.

29. Deny the allegations set forth in paragraph 44 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

30. Deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth in paragraphs 45 and 46 of the Second Amended Complaint.

31. Deny the allegations set forth in paragraph 47 of the Second Amended Complaint.

FIFTH COUNT

32. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 30 of the Second Amended Complaint.

33. Deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth in paragraphs 49 through 53 of the Second Amended Complaint.

SIXTH COUNT

33. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 30 of the Second Amended Complaint.

34. Deny the allegations set forth in paragraph 55 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

35. Deny the allegations set forth in paragraphs 56 and 57 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

36. Admit a list purporting to contain the names of plaintiffs' customers was received by Spectrum, but deny each and every other allegation set forth in paragraph 58 of the Second Amended Complaint.

37. Deny the allegations set forth in paragraph 59 of the Second Amended Complaint.

38. Deny the allegations set forth in paragraph 60 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

SEVENTH COUNT

39. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 30 and 55 through 60 of the Second Amended Complaint.

40. Deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth in paragraphs 62, 63, 64, 65 and 66 of the Second Amended Complaint.

41. Deny the allegations set forth in paragraph 67 of the Second Amended Complaint.

42. Deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth in paragraph 68 of the Second Amended Complaint.

43. Deny the allegations set forth in paragraphs 69 and 70 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

44. Deny the allegations set forth in paragraphs 71, 72, 73 and 74 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

45. Admits Kenneth B. Leighton is employed by Spectrum, but deny each and every allegation set forth in paragraph 75 of the Second Amended Complaint.

46. Deny the allegations set forth in paragraph 76 of the Second Amended Complaint.

EIGHTH COUNT

47. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 30 and 55 through 60 and 62 through 76 of the Second Amended Complaint.

48. Deny the allegations set forth in paragraph 78 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want

of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

49. Deny the allegations set forth in paragraph 79 of the Second Amended Complaint.

NINTH COUNT

50. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 30, 55 through 60, 62 through 76, and 78 and 79 of the Second Amended Complaint.

51. Deny the allegations set forth in paragraphs 81 and 82 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

TENTH COUNT

52. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 30, 51 through 55, 62 through 76, 78 through 79 and 81 and 82 of the Second Amended Complaint.

53. Deny the allegations set forth in paragraphs 84 and 85 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

ELEVENTH COUNT

54. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 30, 49 through 53, and 55 through 60 of the Second Amended Complaint.

55. Deny the allegations set forth in paragraph 87 of the Second Amended Complaint.

56. Deny, for want of knowledge sufficient to form a belief as to the truth thereof, the allegations set forth in paragraphs 88 and 89 of the Second Amended Complaint.

57. Deny the allegations set forth in paragraph 90 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

TWELFTH COUNT

58. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 30 and 55 through 60 of the Second Amended Complaint.

59. Deny the allegations set forth in paragraph 92 of the Second Amended Complaint.

THIRTEENTH COUNT

60. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 30, 32 through 34, 36 through 38, and 40 through 42 and 44 through 47 of the Second Amended Complaint.

61. Deny the allegations set forth in paragraphs 94 and 95 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

FOURTEENTH COUNT

62. Kenneth B. Leighton and Spectrum hereby incorporate by reference their admissions and denials to the allegations set forth in paragraphs 1 through 30, 49 through 52, and 55 through 58 of the Second Amended Complaint.

63. Deny the allegations set forth in paragraph 97 of the Second Amended Complaint as they refer to Kenneth B. Leighton and Spectrum, and deny, for want of knowledge sufficient to form a belief as to the truth thereof, said allegations as they apply to all other defendants.

FIFTEENTH COUNT

Plaintiffs made no allegations against Kenneth B. Leighton or Spectrum in the Fifteenth Count of the Second Amended Complaint, and thus no answer is interposed.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to set forth a cause of action as to defendants Kenneth B. Leighton and Spectrum.

SECOND AFFIRMATIVE DEFENSE

Venue is not proper in this forum as to defendant Kenneth B. Leighton.

THIRD AFFIRMATIVE DEFENSE

Kenneth B. Leighton's and Spectrum's conduct and manner of dealing with plaintiffs in all transactions flowed from Kenneth B. Leighton's and Spectrum's individual actions and decisions.

FOURTH AFFIRMATIVE DEFENSE

Any effect on the market for Sorbothane products due to Kenneth B. Leighton's or Spectrum's actions was reasonable.

FIFTH AFFIRMATIVE DEFENSE

Spectrum's position in the market for Sorbothane products was thrust on it solely as the result of its own business acumen and skill.

SIXTH AFFIRMATIVE DEFENSE

Any differentials in price charged by Spectrum in the sale of Sorbothane products made due allowance for differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which the goods were sold or delivered to Spectrum's customer.

SEVENTH AFFIRMATIVE DEFENSE

Any differentials in price of Sorbothane products charged by Spectrum was made in response to changing conditions affecting the market or marketability of the goods concerned.

WHEREFORE, Kenneth B. Leighton and Spectrum Sports, Inc. demand judgment dismissing plaintiffs' Second Amended Complaint and permitting them to go forth without cost.

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& RANNEY
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Attorneys for Defendants Kenneth B. Leighton and Spectrum Sports, Inc.

(Declaration of Service omitted in printing)

Civil No. 84-1585-E(CM)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(Title omitted in printing)

PRETRIAL ORDER

(Filed April 28, 1988)

Following pretrial proceedings pursuant to F.R. Civ. P. 16 and Local Rule 325,

IT IS ORDERED:

I

A. *Nature of Litigation.*

The complaint alleges the violation of the federal antitrust laws as a result of the attempts by the defendants to fix the resale price of Sorbothane products, monopolize the market for the distribution of Sorbothane products, and engage in other restrictive practices violative of sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act. In addition, the complaint alleges a fraudulent conspiracy to induce the plaintiffs to develop markets for Sorbothane products in the Southwestern United States on the fraudulent representation that plaintiffs would be given a renewable distributorship for sorbothane athletic products and a national distributorship for Sorbothane equestrian products. The complaint also alleges that plaintiffs' right to distribute Sorbothane products was wrongfully terminated after plaintiffs had established an extensive market for Sorbothane products in the Southwestern United States. The complaint also alleges claims for miscellaneous business torts.

B. *Parties.*

1. Plaintiffs SHIRLEY and LARRY McQUILLAN are individuals residing in the City and County of San Diego, State of California. Since approximately August 1981, plaintiffs have done business in the City and County of San Diego, State of California, under the name of SORBOTURF ENTERPRISES.

2. Defendant SORBOTHANE, INC. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Ohio. SORBOTHANE, INC. was formerly known as SORBO, INC. and at all times material was a wholly-owned subsidiary of SW Industries, Inc., which in turn was wholly-owned subsidiary by defendant BTR, INC.

3. Defendant BTR, INC. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Connecticut. BTR, INC. is a privately held company, the shares of which are owned by Silvertown Holdings, Inc., a privately held company, the shares of which are owned by BTR Holdings, Inc., a privately held company, the shares of which are owned by BTR Dunlop, Inc., a privately held company, the shares of which are owned by BTR International, Ltd., a privately held company, the shares of which are owned by BTR, plc. BTR plc is a public company organized under the laws of the United Kingdom the shares of which are traded on the London Stock Exchange.

4. Defendant HAMILTON-KENT MANUFACTURING COMPANY is a corporation organized and existing under the laws of the State of Delaware. At present, HAMILTON-KENT has its

principal place of business in the State of Texas; however, during the time period material to this dispute, HAMILTON-KENT had its principal place of business in the State of Ohio.

5. Defendant KENNETH M. LEIGHTON is an individual who resides in the Cleveland, Ohio area. Mr. LEIGHTON was a principal and president of HAMILTON-KENT MANUFACTURING COMPANY until approximately May 1982.

6. Defendant SPECTRUM SPORTS, INC. (formerly known as Ohio Cushions, Inc.) is a corporation organized and existing under the laws of the State of Ohio with its principal place of business in Twinsburg, Ohio.

7. Defendant KENNETH B. LEIGHTON, the son of defendant KENNETH M. LEIGHTON, is an individual resident of the State of Ohio. At all material times, KENNETH B. LEIGHTON was a principal and president of defendant SPECTRUM SPORTS, INC.

C. *Pleadings Which Raise the Issues.*

The following pleadings raise the issues in this litigation:

1. Second Amended Complaint for Damages for Violation of the Antitrust Laws (sections 1 & 2 of the Sherman Act and Section 3 of the Clayton Act), breach of contract, fraud, violation of federal racketeering laws (18 U.S.C. §1964(c)), unfair competition, bad faith breach of implied covenant of good faith and fair dealing, violation of the Cartwright Act (California Business and Professions Code sections 16600 and 16700) (dated July 21, 1987);

2. Amended Answer of Defendant SORBOTHANE, INC. to Second Amended Complaint (filed July 10, 1987);

3. Amended Answer of Defendant BTR, INC. to Second Amended Complaint (filed July 10, 1987);

4. Amended Answer of Defendant HAMILTON-KENT MANUFACTURING COMPANY to Second Amended Complaint (filed July 10, 1987);

5. Amended Answer of Defendant KENNETH M. LEIGHTON to Second Amended Complaint (filed July 10, 1987);

6. Answer of Defendants KENNETH B. LEIGHTON and SPECTRUM SPORTS, INC. to Second Amended Complaint (dated August 13, 1986);

II

Federal jurisdiction and venue are invoked upon the following grounds alleged in the second amended complaint:

1. This Court has jurisdiction under sections 4 and 16 of the Act of Congress of October 15, 1914, 15 U.S.C. sections 15, 26, as amended, commonly known as the Clayton Act and 28 U.S.C. section 1337(a). The first and third counts of the complaint arise under sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) and section 3 of the Clayton Act (15 U.S.C. §15).

2. Jurisdiction is also based on this Court's jurisdiction to hear any civil action brought by any person injured in his business or property by reason of a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. section 1961 *et seq.* ("RICO"). Counts six through nine of this complaint are filed pursuant to title 18 U.S.C. section 1964(c) to recover damages which plaintiffs have sustained due to violations of the federal racketeering laws.

3. Jurisdiction is also based on this Court's pendant jurisdiction over the claims of plaintiffs arising under California law.

4. Jurisdiction is also based on the Court's diversity jurisdiction, 28 U.S.C. section 1332(a)(1).

5. Venue is appropriate in this judicial district pursuant to the provisions of title 15 U.S.C. section 22, title 18 U.S.C. section 1965, and titled 28 U.S.C. sections 1991(b) and (c) and section 1392(a).

III

The following facts are admitted and require no proof:

1. Defendant SORBOTHANE, INC. ("SORBOTHANE") (formerly called SORBO, INC.) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Ohio. SORBOTHANE is a wholly-owned subsidiary of S.W. Industries, Inc. ("S.W.") which is, in turn a wholly-owned subsidiary of defendant BTR, INC. ("BTR").

2. Defendant HAMILTON-KENT MANUFACTURING COMPANY, ("HAMILTON-KENT") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Texas. HAMILTON-KENT is a wholly-owned subsidiary of S.W. which is, in turn, a wholly-owned subsidiary of defendant BTR.

3. During the time period material to this dispute, HAMILTON-KENT MANUFACTURING COMPANY had its principal place of business in the State of Ohio.

4. In or about April or May 1982, SORBOTHANE, INC. was formed to operate the SORBOTHANE business which was previously operated by HAMILTON-KENT MANUFACTURING COMPANY. KENNETH M. LEIGHTON became the president of SORBOTHANE, INC. and continued in that capacity until in or about mid-1984.

5. Defendant KENNETH M. LEIGHTON ("K.M.L.") was the president of defendant SORBOTHANE and defendant HAMILTON-KENT at all times material to the allegations of the second amended complaint. Defendant K.M.L. is a citizen and a resident of the State of Ohio.

6. Defendant SPECTRUM SPORTS, INC. (formerly known as Ohio Cushions, Inc.) is a corporation organized and existing under the laws of the State of Ohio with its principal place of business in Twinsburg, Ohio.

7. Defendant KENNETH B. LEIGHTON, the son of defendant KENNETH M. LEIGHTON, is an individual resident of the State of Ohio. At all material times, KENNETH B. LEIGHTON was a principal and president of defendant SPECTRUM SPORTS, INC.

8. Ohio Cushions, Inc. began operating in July 1981 and incorporated on January 8, 1982. The name of the corporation was changed on October 13, 1983 to SPECTRUM SPORTS, INC. Defendant KB LEIGHTON is, and at all pertinent times was, a 50% shareholder in SPECTRUM SPORTS, INC.. The other 50% shareholder is Michael J. Silvestro.

9. The polymer shock absorbant material known as Sorbothane is a legally patented product, U.S. Patent No. 4,346,205. "Sorbothane" is a registered trademark of

SORBOTHANE, INC. for which a certificate of registration, No. 1313137, has been issued by the Patent and Trademark Office of the United States.

10. Laurene Heinsohn at the time she began work for HAMILTON-KENT had recently graduated from Kent State College in December 1979 with a degree in business administration and had limited, if any, actual marketing experience. She began as an in-house sales assistant and in January 1981, became marketing manager for HAMILTON-KENT's Urethane Division.

11. Defendant K.M.L. was, at all times relevant to this action, while president of HAMILTON-KENT and SORBOTHANE acting within the scope of his authority as an employee of these companies.

12. John Cahill was, at all times relevant to this action, acting within the scope of his authority as president of BTR.

13. KENNETH B. LEIGHTON ("K.B.L."), at no time after leaving his position with defendant SORBOTHANE, had any authority to act on behalf of defendants SORBOTHANE, HAMILTON-KENT, K.M.L., or BTR.

14. Defendant SPECTRUM SPORTS, INC. (formerly known as Ohio Cushions) had no authority to act on behalf of defendants SORBOTHANE, HAMILTON-KENT or BTR.

IV

The reservations as to the facts recited in paragraph III above are as follows:

There are no contentions of fact which fall within this category.

V

The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary:

There are no contentions of fact which fall within this category.

VI

The following issues of fact, and no others, remain to be litigated upon the trial:

A. *Parties.*

1. Plaintiffs SHIRLEY and LARRY McQUILLAN are individuals residing in the City and County of San Diego, State of California. Since approximately August 1981, plaintiffs have done business in the City and County of San Diego, State of California, under the name SORBOTURF ENTERPRISES.

2. Defendant BTR, INC. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Connecticut. BTR, INC. is a privately held company, the shares of which are owned by Silvertown Holdings, Inc., a privately held company, the shares of which are owned by BTR Holdings, Inc., a privately held company, the shares of which are owned by BTR Dunlop, Inc., a privately held company, the shares of which are owned by BTR International, Ltd., a privately held company, the shares of which are owned by BTR, plc. BTR plc is a public company organized under the laws of the United Kingdom the shares of which are traded on the London Stock Exchange.

3. Defendant BTR is a Delaware corporation with its principal place of business located in Stamford, Connecticut. Prior to January 1, 1987, its principal place of business was located in Providence, Rhode Island. Defendant BTR is a wholly-owned subsidiary in the family of companies wholly-owned by BTR, plc, a corporation organized and existing under the laws of the United Kingdom. Defendant BTR has negligible contacts with the forum State of California.

4. Defendant HAMILTON-KENT MANUFACTURING COMPANY was formed and the stock owned by SW Industries following the acquisition of the assets of an Ohio corporation which was also known as HAMILTON-KENT MANUFACTURING COMPANY. The assets of the former HAMILTON-KENT MANUFACTURING COMPANY were acquired and then the former corporation was liquidated and the assets transferred to the new HAMILTON-KENT MANUFACTURING COMPANY. All references herein are to HAMILTON-KENT MANUFACTURING COMPANY, a Delaware corporation, owned by SW Industries, Inc.

5. Defendant KENNETH M. LEIGHTON is an individual who resides in the Cleveland, Ohio area. KENNETH M. LEIGHTON was a principal and president of the former HAMILTON-KENT MANUFACTURING COMPANY, and after the acquisition of its assets by the BTR organization, served as the president of HAMILTON-KENT MANUFACTURING COMPANY until approximately May 1982.

6. At all material times since at least the creation of HAMILTON-KENT MANUFACTURING COMPANY, as a subsidiary of SW Industries, and at least until the

formation of SORBO, INC. in or about April or May 1982, HAMILTON-KENT MANUFACTURING COMPANY functioned as a division of BTR, INC. and was held out in California and elsewhere, as a division of BTR, INC. At all material times, HAMILTON-KENT was the agent and alter ego of BTR, INC.

7. Defendant HAMILTON-KENT has, at all times material to this action, maintained a separate and independent corporate identity distinct and apart from that of defendant BTR. Defendant HAMILTON-KENT is neither controlled nor dominated by defendant BTR, and no agency or alter ego relationship exists between the two companies.

8. At all material times since the formation of SORBOTHANE, INC. in or about April or May 1982, SORBOTHANE, INC. was the agent and alter ego of BTR, INC.

9. Defendant SORBOTHANE has, at all times material to this action, maintained a separate and independent corporate identity distinct and apart from that of defendant BTR. Defendant SORBOTHANE is neither controlled nor dominated by defendant BTR, and no agency or alter ego relationship exists between the two companies.

10. Defendant BTR, INC. ("BTR") is a holding company and is the parent or grandparent corporation of HAMILTON-KENT MANUFACTURING COMPANY ("HAMILTON-KENT") and SORBOTHANE, INC. ("SORBOTHANE").

11. HAMILTON-KENT was the first of the corporate defendants to become involved in the development and marketing of sorbothane products. At all times pertinent hereto, KENNETH M. LEIGHTON was president of HAMILTON-KENT.

12. SORBO, INC. was later created for the purpose of marketing sorbothane products. SORBO, INC.'s name was subsequently changed to SORBOTHANE, INC. KENNETH M. LEIGHTON was the president of SORBO, INC. from its inception until he was replaced by Robert Boyd.

B. *Related Non-Parties.*

13. BTR plc, is the parent corporation of a large conglomerate of private corporations with substantial revenues and profits based on worldwide operations.

C. *Background Facts.*

14. Sorbothane is a material the patent for which is held by an entity located in the United Kingdom known as British Technology Group (formerly known as NRDC). Defendants BTR, HAMILTON-KENT and SORBOTHANE have, at all material times, held a license for the manufacture and sale of sorbothane products worldwide.

15. At all material times, defendant SORBOTHANE has manufactured and sold within the United States, and elsewhere, sorbothane and sorbothane products for commercial, industrial and medical uses.

16. Prior to 1982, defendant HAMILTON-KENT was a duly licensed, non-exclusive manufacturer for sorbothane material in the United States.

17. In 1982, defendant SORBOTHANE assumed the patent license for the manufacture of sorbothane material in the United States from defendant HAMILTON-KENT. Defendant SORBOTHANE has, pursuant to this license, manufactured and sold patented sorbothane material in the United States at all times material to this action on a non-exclusive basis.

18. At no time did defendant BTR have any right to manufacture and sell sorbothane material, and at no time did it ever engage in such manufacturing or sales.

19. Sales of sorbothane and products manufactured with sorbothane by HAMILTON-KENT and SORBOTHANE have occurred both within and without the United States and have involved both direct sales and sales through distributors and other intermediaries.

20. The production and sale of sorbothane material is a small, sideline activity in relation to the overall range of products manufactured by the BTR network of subsidiaries. ¶A(13)]

21. Sorbothane is a unique patented polymer material with extremely high shock absorbent properties. Sorbothane has received nationwide acclaim for its shock absorbent properties.

22. The patented sorbothane material has a wide variety of shock absorbing uses, including but not limited to, use as inserts for both common and sporting shoes, orthopedic and medical applications, and various other applications where shock absorbing material such as foam rubber is typically used.

23. Defendant HAMILTON-KENT elected initially to market but one use of the sorbothane material, *i.e.*, shoe insert insoles, in an attempt to penetrate the established market in this regard dominated by, *et al.*, Dr. Scholls.

24. Defendant HAMILTON-KENT initially attempted to market this product through established distribution sources such as Dr. Scholls, but was rejected by such sources.

25. Defendant HAMILTON-KENT (and later defendant SORBOTHANE) perceived there was a limited window of opportunity to market sorbothane material. This window of opportunity had to be quickly utilized or would be lost.

26. Sorbothane is a shock-absorbing polymer. HAMILTON-KENT first became aware of sorbothane in late 1979.

27. Sorbothane was invented in the United Kingdom by Maurice Hiles working under the sponsorship of BTG (then known as NRDC). Sorbothane was first introduced into the United States market in or about mid-1980 through BTR's division, HAMILTON-KENT. As of September 1983, the most commercially successful application of the product was the manufacture of athletic shoe innersoles and heel inserts. Because of the extreme popularity of high impact sports such as running and aerobics, a significant and expanding market for such products existed at least during the period July 1980 through and including September 1983. Significant increases in sorbothane's volume of business and market share were forecast by SORBOTHANE and BTR in or about September 1983.

28. SORBOTHANE material enjoyed what limited success it had in the United States due, in part, fortuitously to being featured on the prime-time network television show "That's Incredible," in March, 1982 and January, 1983.

29. The sales of sorbothane material rose rapidly after its initial roll-out, but peaked quickly and fell as rapidly as they rose after 1983.

30. In addition to athletic shoe inserts, a variety of other products were being offered or in the development stage as of September 1983. These products included so-called "medical grade" sorbothane inserts which were sorbothane sole inserts manufactured and repackaged with a different color for the so-called medical market, miscellaneous industrial applications, toys, additional athletic products and equestrian products.

31. The "shoe insert" market for sorbothane experienced considerable growth since its introduction into the United States market. Because of the importance of absorbing shock in athletic shoes (shoes designed for high impact sports such as running) athletic shoe inserts constitute the relevant product market. Consumers are willing to pay for the additional cost of a specialized product such as sorbothane as an insert in athletic shoes. Products designed for the "mass market" of shoe buyers do not compete with sorbothane athletic shoe inserts. Because of the uniqueness of sorbothane, sorbothane shoe inserts constitute a product submarket in that shoe inserts not manufactured from visco-elastic polymers are not perceived by consumers as substitutable for sorbothane and, in fact, are not substituted for sorbothane. As of mid 1983, SORBOTHANE dominated the athletic shoe insert market with approximately 80 to 90% of the sales in that market.

32. Most major manufacturers of sporting shoes (Nike, Adidas, New Balance, Tiger, Musak, Converse and Brooks) manufacture shoe inserts designed primarily for use with or as replacement inserts for shoes marketed by them. With the exception of Nike (which, for some period of time, manufactured athletic shoes using sorbothane under contract with SORBOTHANE), these

products are not made from visco-elastic polymer material and lack the shock absorbent properties of sorbothane.

33. Because sorbothane is a patented material which has received wide acclaim for shock absorbent properties, sorbothane inserts are perceived as unique and desirable as a supplement to or replacement for shoe inserts sold with athletic shoes or as an insert for shoes with no other innersole or heel inserts.

34. As of September 1983, sorbothane shoe inserts were sold in sporting goods stores, shoe stores carrying sport and training shoes, department stores carrying sport and training shoes, and general or "box shoe" type retail stores. Sorbothane was also sold as "sheet stock" for adaption to various uses by the purchaser.

35. As of September 1983, plaintiffs had developed a substantial volume of business for sorbothane shoe inserts and sheet stock primarily with retail accounts in the southwestern United States. Gross sales were approximately $320,000 for the first eight months of 1983 and would have averaged approximately $45,000 to $60,000 per month for January through August 1983 had non-defective products been made available to plaintiffs in sufficient quantities. As of September 1983, plaintiffs were expecting significant growth in the market for sorbothane products and had invested a considerable amount of time, energy and money in the development of a market for sorbothane in the southwestern United States. In addition, plaintiffs had made substantial contributions to a national advertising budget for the national promotion of sorbothane products.

36. Defendant KML, in his capacity as president for defendant HAMILTON-KENT and, later, defendant, SORBOTHANE, delegated significant day-to-day marketing responsibility to Laurene Heinsohn.

37. Defendant HAMILTON-KENT considered appointing a single national distributor for this product, but instead opted to locate regional outlets to begin the national roll-out of sorbothane.

38. Through the first part of 1980, HAMILTON-KENT researched plans to distribute sorbothane-containing shoe insoles and heels through Dr. Scholl's. Neil Crowley, HAMILTON-KENT's marketing manager, was initially in charge of the project. KENNETH M. LEIGHTON was the president of HAMILTON-KENT. KB LEIGHTON was a vice president in charge of sales and had little involvement in the sorbothane project.

39. In the late summer of 1980 the plan to market sorbothane through Dr. Scholl's fell through. Totes, which had also been approached as a distributor for sorbothane products, was interested but claimed it would need six to nine months to analyze the product. KENNETH M. LEIGHTON decided he could not wait that long to go to market and agreed with Byron Donzis that Donzis would serve as national distributor for sorbothane insoles and heels. KENNETH M. LEIGHTON's decision to use a national distributor for sorbothane sports products was consistent with his plan to use a national distributor for each of the various sorbothane lines, including sports products, equestrian products and stereo applications.

40. In May 1981, KENNETH M. LEIGHTON fired Donzis because Donzis had not sold any product and his prospects for doing so were poor. Laurene Heinsohn was then given the charge of developing a marketing plan for

sorbothane. Her research was informal and involved discussions with KENNETH M. LEIGHTON and KB LEIGHTON. She eventually decided not to use regional distributors because of the past failures HAMILTON-KENT had had with Scholl's, Totes and Donzis. Time was a problem because no one was immediately available to replace Donzis and HAMILTON-KENT did not wish to market the product itself because it had no experience in marketing consumer products.

41. Heinsohn decided to use Lund, Vogel, McQUILLAN and Myron McCone (McQUILLAN's father) as regional distributors primarily because of their interest in sorbothane, even though they lacked marketing experience. Shortly thereafter, KB LEIGHTON terminated his employment with HAMILTON-KENT and notified KENNETH M. LEIGHTON and Heinsohn of his interest in serving as a distributor for sorbothane sports products. He became the fifth regional distributor.

D. *Equestrian Distributorship.*

42. In or about June 1980, plaintiff SHIRLEY McQUILLAN became aware of the existence of sorbothane and shortly thereafter, she contacted the inventor of the material, Maurice Hiles to inform Hiles that she was interested in learning more about the material and developing a horsehoe pad and other equestrian products using sorbothane.

43. SHIRLEY McQUILLAN had extensive training, education and experience in equestrian matters and had been involved in the care, training and riding of horses since she was a child. SHIRLEY McQUILLAN had also practiced as a horse chiropractor since her graduation from high school.

44. Mr. Hiles invited SHIRLEY McQUILLAN to visit the Ohio facility of HAMILTON-KENT and discuss equestrian uses of sorbothane.

45. In or about October 1980, SHIRLEY McQUILLAN and her two partners at the time met with Maurice Hiles, KENNETH M. LEIGHTON and other representatives of HAMILTON-KENT at the HAMILTON-KENT facility in Ohio. As a result of this meeting, a written contract was prepared and executed by HAMILTON-KENT providing for the development by plaintiff SHIRLEY McQUILLAN and her associates of horseshoe pads and other equestrian products using sorbothane in exchange for exclusive rights to the distribution of sorbothane equestrian products. Shortly thereafter, SHIRLEY McQUILLAN and her partners dissolved their association and SHIRLEY McQUILLAN alone became the equestrian consultant and distributor for sorbothane products. From that point forward, until approximately mid 1982, SHIRLEY McQUILLAN was held out by HAMILTON-KENT and SORBOTHANE as their equestrian consultant and distributor-to-be working on the development of sorbothane equestrian products. During that period HAMILTON-KENT through KENNETH M. LEIGHTON and others repeatedly represented to SHIRLEY McQUILLAN that she would have the exclusive right to distribute equestrian products using sorbothane.

46. With respect to the development and distribution of equestrian sorbothane products, HAMILTON-KENT was first approached in or about October 1980 by Theodore P. Jardine, Jr. and his wife Alby Jardine of San Diego, California who were doing business under the name Safe and Sound Sports Products ("Safe and Sound"). Plaintiff Shirley McQuillan

had a business relationship with Safe and Sound acting as a consultant to that entity in respect to certain of its business activities. Included among the proposed equestrian uses as proposed by Safe and Sound was a horseshoe pad. Thereafter, Safe and Sound was unable successfully to develop a horseshoe pad of sorbothane material.

47. Thereafter SORBOTHANE had discussions with plaintiff SHIRLEY McQUILLAN regarding development of equestrian uses for the patented sorbothane material.

48. After separating from her partners, McQUILLAN continued to try to develop a marketable sorbothane containing horseshoe pad. She failed.

49. During the period October 1980 through approximately February 1983, SHIRLEY McQUILLAN spent a considerable amount of time, effort and money in the development of equestrian products. Her work included the design of horseshoe pads and other equestrian products, the testing of various horseshoe pads on horses and the consultation with Maurice Hiles and other representatives of HAMILTON-KENT in the formulation of various designs and component materials to be used in the fabrication of sorbothane equestrian products.

50. SHIRLEY McQUILLAN received no compensation or reimbursement for expenses for the time or money spent in the research and testing program for the development of sorbothane equestrian products; nor did she receive any royalties or other consideration from the sale of sorbothane equestrian products.

51. During the period that SHIRLEY McQUILLAN was involved in the research and testing of sorbothane equestrian products, she was encouraged

to continue her efforts by defendants. SHIRLEY McQUILLAN was informed by Maurice Hiles that she was instrumental in the development of sorbothane equestrian products, that her name would be included in the patent, that any royalties received from the development of the horseshoe pads would be shared with her and that she would be the national equestrian distributor notwithstanding statements to the contrary being made by other employees and representatives of SORBOTHANE.

E. *Athletic Distributorship.*

52. In or about January 1981 through August 1981, HAMILTON-KENT, through defendant KENNETH M. LEIGHTON and other representatives of HAMILTON-KENT, represented to SHIRLEY McQUILLAN that HAMILTON-KENT was developing its plan for the promotion and distribution of products to be manufactured from sorbothane. As a result of her interest in the equestrian uses of the product, and based on her contacts with representatives of HAMILTON-KENT and the inventor of the product, SHIRLEY McQUILLAN was invited to become a distributor for sorbothane products then available for sale in a specified region of the southwestern portion of the United States.

53. In our about August 1981, defendant HAMILTON-KENT entered into an oral agreement with plaintiff SHIRLEY McQUILLAN whereby SHIRLEY McQUILLAN was designated as the exclusive distributor for the southwestern United States for sorbothane products (other than equestrian products for which she was to be the national distributor). The essential terms of the agreement were as follows:

a. SHIRLEY McQUILLAN was to have the exclusive right to distribute sorbothane products then contemplated for the United States market in the southwestern United States territory consisting of southern California, New Mexico, Arizona, Colorado and parts of Nevada. HAMILTON-KENT was to provide support and assistance to SHIRLEY McQUILLAN to accomplish the goals shared by both HAMILTON-KENT and SHIRLEY McQUILLAN of developing a market for sorbothane products and developing and enhancing the positive reputation for sorbothane.

b. In exchange, plaintiff SHIRLEY McQUILLAN agreed to use her best efforts to develop the market for sorbothane products within her territory and to spend such time, energy and money as was necessary and appropriate to develop the retail market for sorbothane products and promote and sell sorbothane throughout her territory.

54. SHIRLEY McQUILLAN was advised that the term of the distributorship would be "indefinite" for so long as she was using her best efforts to carry out her responsibilities as a distributor in a satisfactory way. After some discussion, the agreement evolved to provide for an initial term of five years renewable for five-year periods, at the election of plaintiff SHIRLEY McQUILLAN, provided her performance as a distributor was satisfactory. KENNETH M. LEIGHTON represented that a written agreement embodying the terms of the distributorship would be prepared and presented to SHIRLEY McQUILLAN for execution. Draft distributorship agreements were exchanged at various times following August 1981; however, in each case, HAMILTON-KENT and SORBOTHANE suggested terms at variance with the agreement reached between the parties during the discussions that occurred in July through December 1981.

55. Defendant HAMILTON-KENT had no further dealings or responsibilities with plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES after defendant SORBOTHANE became the duly licensed manufacturer for sorbothane material in 1982.

56. The oral understanding between defendants HAMILTON-KENT and SORBOTHANE and plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES had, either as additional implied terms or terms created by a course of dealing between the parties, the following:

a. Plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES was to have the right to resell certain sorbothane products in a sales territory consisting of Southern California, New Mexico, Arizona, Utah and Colorado;

b. Plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES was to develop the market for the sorbothane products within her sales territory and was to devote exclusively her business time to this end;

c. Plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES was also required to maintain adequate facilities, staff and business records, pay for all goods in a timely fashion, regularly report her activities and generally cooperate with defendants HAMILTON-KENT and SORBOTHANE; and

d. Plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES was to advertise sorbothane products in her territory, and contribute to national advertising to be coordinated through defendants HAMILTON-KENT and SORBOTHANE.

57. This oral understanding was never formalized in writing and was terminable at will by either party. It was contemplated, however, that a more specific agreement would be made in writing.

58. Defendants HAMILTON-KENT and SORBOTHANE sold certain of their material through various persons and entities throughout the United States who in turn resold it to retailers.

59. At no time material to this action did any of the defendants ever deal in any fashion with plaintiff, LARRY McQUILLAN, and were never aware of any purported business relationship between he and plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES.

60. At no time was defendant BTR a party to any agreement or understanding with the plaintiffs, and at no time did it represent itself to be such a party.

61. At no time did defendant BTR ever assume or adopt any agreement between the plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES and defendants HAMILTON-KENT or SORBOTHANE.

62. Defendants HAMILTON-KENT and SORBOTHANE at no time represented BTR with respect to the relationship with the plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES, nor did they ever represent that they were acting for or on behalf of BTR.

63. At no time relevant to this action did plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES rely upon the status of BTR as the parent for defendants HAMILTON-KENT or SORBOTHANE; and plaintiff, SHIRLEY McQUILLAN, was always aware she was dealing exclusively with HAMILTON-KENT and later Sorbothane.

64. Should plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES, adduce evidence that the alleged agreement was for a term greater than one year, defendants will show that:

a. The contract could not be performed within one year within the meaning of the statute of frauds;

b. There was no writing signed by the defendants sufficient to show the essential terms and conditions of the agreement within the meaning of the statute of frauds;

c. Plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES has not, with justifiable reliance upon the oral agreement so changed her position so as to suffer an unconscionable injury if the agreement is not enforced;

d. The defendants have not, due to justifiable reliance by plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES, been unjustly enriched; and

e. Defendants did not perpetrate a fraud on plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES with respect to inducing performance under the oral agreement.

65. In or about the second half of 1981, HAMILTON-KENT established a nationwide distributorship system for sorbothane products (excluding equestrian products which were still being developed by SHIRLEY McQUILLAN) and created four other independent regional distributors under agreements similar to the agreement entered into with SHIRLEY McQUILLAN. The other distributors were: Absorbotech, whose territory was the northwestern United States; RHR, Inc., whose territory was the upper

midwest; Ohio Cushions (later SPECTRUM SPORTS, INC.), whose territory was the lower midwest and southeastern United States; and Triad Research, whose territory was the northeast. Together, the five regional distributors provided distribution of sorbothane products throughout the lower 48 United States.

66. As of January 1982, the distribution system for SORBOTHANE was in place with a total of five regional distributors, each of which commenced operation under an oral agreement with HAMILTON-KENT. One of these distributors was defendant KENNETH B. LEIGHTON who had resigned from his position as vice president of HAMILTON-KENT and had formed Ohio Cushions for the purpose of distributing sorbothane products in a territory of approximately 30 states.

67. Because the product was new and the person or entities reselling it had no established track records, defendants HAMILTON-KENT and SORBOTHANE, respectively, determined that they would not enter into any long term distribution arrangements.

68. This policy of distribution arrangements, which did not specify long-term commitments, is and was consistent with sound business practices and with normal, generally applicable, operating procedures for the subsidiaries of BTR.

69. No specific period or term was ever offered to SHIRLEY McQUILLAN except as set forth in written agreements tendered to her which she refused to sign.

70. In or about February 1981, Arnold Lund and Martin Vogel separately came to the attention of HAMILTON-KENT. Each had been involved in the medical field and was interested in becoming involved in the medical applications of sorbothane. Lund was located in Seattle, and Vogel in New York.

71. On July 27, 1981, Heinsohn wrote to each of the five potential distributors setting out their respective territories and the conditions under which they would serve as distributors. Each distributor was already located in a different part of the country which made a determination of their territories easier. K.B. LEIGHTON's territory was the Midwest and the Southern states, McQUILLAN's the Southwestern states, Lund's the Northwestern states, Myron McCone's the North Central states, and Vogel's the Northeastern states.

72. In the spring of 1982, McQUILLAN was serving as a distributor in the sporting goods market and also continuing to try to develop Sorbothane Equestrian products. KENNETH M. LEIGHTON told her she could continue to work in the equine area, but only if she concentrated solely in that area and divested her sporting goods distributorship.

73. HAMILTON-KENT mailed proposed distributorship agreements to each of the distributors. The agreement contained a provision permitting either party to terminate on 90 days notice. This provision was disagreeable to all the distributors. Ohio Cushions, Inc. was the only distributor to sign the agreement. The others refused.

74. In or about August 1981, plaintiffs SHIRLEY McQUILLAN and LARRY McQUILLAN commenced doing business under the name SORBOTURF ENTERPRISES, and SORBOTURF ENTERPRISES acted with the consent of HAMILTON-KENT as the distributor of the southwestern United States territory under the oral agreement referred to above.

75. Following the creation of SORBOTURF ENTERPRISES as a distributor of sorbothane products, SORBOTURF ENTERPRISES attempted to raise additional capital to finance the expansion of the operations of SORBOTURF ENTERPRISES with the expectation of creating larger and more modern facilities, additional employees and a larger inventory. At all times, however, SORBOTURF ENTERPRISES was discouraged by KENNETH M. LEIGHTON from raising capital for such purposes and was encouraged to "grow slowly."

76. At all times following the creation of SORBOTURF ENTERPRISES as a distributor of sorbothane products, and up to the wrongful termination of the distributorship in or about August 1983, plaintiffs performed all conditions and covenants on their part to be performed in accordance with the distributorship agreement.

77. In addition, at all times material, plaintiffs paid an assessment to HAMILTON-KENT and SORBOTHANE which was represented to be for the purpose of contributing to the national advertising of sorbothane products and to build and develop the market for the future.

78. KENNETH M. LEIGHTON and Laurene Heinsohn, marketing manager, on behalf of HAMILTON-KENT, represented to SHIRLEY McQUILLAN that her rights to distribute sorbothane products in the southwestern United States would continue indefinitely for so long as she was doing a satisfactory job and using her best efforts to develop the market. KENNETH M. LEIGHTON and Laurene Heinsohn further represented that written contracts embodying the terms and conditions orally agreed to

would be provided. At the time those representations were made, KENNETH M. LEIGHTON and Laurene Heinsohn had no intention of keeping their promises. On the contrary, KENNETH M. LEIGHTON had established his son, KENNETH B. LEIGHTON, as a regional distributor ("SPECTRUM SPORTS, INC.") with the intent of making his son the national distributor after the market was developed. Plaintiffs, along with the other regional distributors other than SPECTRUM SPORTS, INC., were chosen by KENNETH M. LEIGHTON, KENNETH B. LEIGHTON and Laurene Heinsohn with the expectation that they would fail as distributors and would be terminated, permitting KENNETH B. LEIGHTON to take over the national market. SHIRLEY McQUILLAN and the other regional distributors were selected in order to assist in the early development of the markets and to use their time, energy and money in developing regional markets for the ultimate benefit of KENNETH B. LEIGHTON, HAMILTON-KENT and SORBOTHANE. They were also chosen with the expectation that their performance would compare adversely to the performance of SPECTRUM SPORTS, INC. thereby giving KENNETH M. LEIGHTON an excuse to appoint KENNETH B. LEIGHTON (and his company, SPECTRUM SPORTS, INC.) as the national distributor.

79. The creation of a single national distributor for sorbothane products was also necessary to implement a price fixing plan to fix the wholesale and retail price of sorbothane by BTR, HAMILTON-KENT/SORBOTHANE and SPECTRUM SPORTS, INC..

80. The creation of a single national distributor for sorbothane products was also necessary and desirable to acquire, preserve and extend the monopoly power which

defendants BTR, HAMILTON-KENT/SORBOTHANE and SPECTRUM SPORTS, INC. had in the national and regional markets for shock absorbent athletic shoe inserts.

81. At least as early as January 1982, a specific scheme was devised to implement the appointment of SPECTRUM SPORTS, INC. as the national distributor and to permit SPECTRUM SPORTS to systematically take over the territories of the other distributors seriatim.

82. The specific scheme to eliminate the other regional distributors, including plaintiffs, was devised by KENNETH M. LEIGHTON, KENNETH B. LEIGHTON, Laurene Heinsohn and John Burne (president of IEM Orthopedics, a company which had an interest in developing the sorbothane medical market and taking over that market from the regional distributors). The specifics of the scheme included the imposition and manipulation of credit terms to frustrate distributors; the setting of unrealistic quotas and misrepresenting sales volume achieved by SPECTRUM SPORTS, INC.; raising prices without sufficient notice so as to prevent the distributors from passing on price increases; pressuring distributors to sell their distributorships through misrepresentations; use of threats and intimidation; systematically eliminating various products from the product lines of the regional distributors; intentionally shipping defective products; misrepresenting the intent to provide plaintiffs with the exclusive distributorship for equestrian products; fabricating complaints with the performance of plaintiffs and other distributors; refusing to negotiate in good faith for the consummation of a written distributorship agreement; misrepresenting the need for uniformity in

distributorship agreements as a basis for refusing to negotiate; misrepresenting defendants' intention regarding the acquisition and confidentiality of the customer lists of plaintiffs and the other regional distributors; using the confidential customer list of plaintiffs and other regional distributors for improper purposes; refusing to permit plaintiffs and the other regional distributors from participating in new products developed by SORBOTHANE on an equal basis with SPECTRUM SPORTS, INC.; creating SPECTRUM SPORTS, INC. as a national distributor of certain products for the purpose of undermining sales activity in plaintiffs' territory; and falsely representing SPECTRUM SPORTS, INC. as the national distributor of athletic products at a time when plaintiffs and other regional distributors were also being held out as regional distributors in their territories.

83. The distributors met for the first time at a sporting goods show in Chicago in early February 1982. Before the meeting Heinsohn had decided Ohio Cushions should serve as HAMILTON-KENT's national distributor because of Ohio Cushions' better sales and significantly greater potential. To persuade the other distributors to adopt her position, she artificially inflated Ohio Cushions' sales records. She also met with each distributor to disuss her plan to name Ohio Cushions as national distributor, and to have the others serve as manufacturer's representatives. None of the distributors accepted her proposal.

84. In February and March 1982, HAMILTON-KENT tightened dramatically the distributors' credit. Ohio Cushions, by then the largest distributor, was told to reduce overnight its receivables to $100,000, and then to further reduce its receivables to $50,000 in four days. It did so. At the same time, Vogel was overextended by

$30,000, his sales were quite low, and his prospects poor. His distributorship was terminated. His territory was taken over by Ohio Cushions. Ohio Cushions then bought out Lund's distributorship.

85. In or about March, 1982, and immediately prior to the contemplated airing of a nationwide television program ("That's Incredible") featuring sorbothane, HAMILTON-KENT terminated Absorbotech and Triad Research on the pretext of credit problems. Triad Research and Absorbotech were terminated prior to the airing of the national T.V. spot featuring sorbothane for fear that following the airing of that program, their sales would be sufficient to solve the credit problems that were used as a pretext for their termination. At the time of their termination, KENNETH B. LEIGHTON and SPECTRUM SPORTS, INC. had the largest account payable to HAMILTON-KENT of any of the regional distributors. Plaintiffs' distributorship was not terminated at that time because there were no credit problems and there was insufficient reason to justify such a termination. Moreover, plaintiffs were spending a considerable amount of time, effort and money in the development of the market in the southwestern United States which defendants wished to have continue preparatory to the takeover of that territory by SPECTRUM SPORTS, INC..

86. The scheme referred to above was implemented over the period from January, 1982 through August, 1983 through the use of coercion, misrepresentation and intimidation designed to frustrate plaintiffs and cause plaintiffs to give up their distributorship to SPECTRUM SPORTS, INC..

87. Defendant Sorbothane did not cease selling sorbothane products to plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES because plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES was engaging in discussions or activities with a competitor of SORBOTHANE.

88. Notwithstanding the employment of such unfair tactics, plaintiffs' market share continued to grow and plaintiffs performed satisfactorily as a distributor of sorbothane products.

89. Ultimately, and in order to implement their plan for the creation of SPECTRUM SPORTS, INC. as the national distributor of SORBOTHANE athletic products, and to further their goal of total control of the market, monopolization of the market and implementation of their price fixing agreements, defendants BTR and SORBOTHANE terminated SORBOTURF as a distributor without just cause (or any cause whatsoever) and at a time when the market for sorbothane products was rapidly rising and when SORBOTHANE was projecting significant increases in the markets for sorbothane products.

90. The decision to stop selling to plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES was made by defendant KML, at least in part, on the advice and information provided to him by Laurene Heinsohn.

91. At the time of the termination of plaintiffs' distributorship, plaintiffs' sales were rising at a dramatic rate even though SORBOTHANE was employing tactics designed to frustrate plaintiffs' efforts.

92. Based on defendants' sales forecasts, the value of plaintiffs' right to distribute SORBOTHANE athletic products in their territory was approximately $2,203,000 at or about the time of the termination.

93. The sales projections for the national marketing of sorbothane material were overly optimistic, unrealistic and never achieved during the relevant time period.

94. Defendant SORBOTHANE had numerous and valid reasons to be dissatisfied with the performance of plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES.

95. Defendant SORBOTHANE, although not required to have cause to terminate plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES, in that the oral understanding was terminable at will, did in fact have cause to terminate plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES due to her inadequate and unacceptable performance as detailed above which amounted to a material breach of express or implied terms of the understanding.

96. Plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES' business valued as of August 1, 1983 was worth no more than $80,000.

97. Alternatively, if plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES demonstrates that she lost profits as a result of SORBOTHANE's decision to cease selling product to her, such profits are based on pro-rating of her market share over the years of the alleged contract and are no more than $80,000.

98. To the extent that plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES suffered any injury or damages as the result of any

actions by the defendants, plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES failed to engage in all reasonable efforts to mitigate that damage.

99. Throughout her tenure as a distributor, McQUILLAN had failed to cooperate with HAMILTON-KENT's regular reporting requirements; she failed or refused to send customer lists, financial information and other marketing data. Finally, on August 3, 1983 HAMILTON-KENT terminated SHIRLEY McQUILLAN's sporting goods distributorship and advised her she would not be permitted to purchase for resale any further sporting goods products. Neither KB LEIGHTON nor SPECTRUM SPORTS, INC. was involved in that decision, nor were either aware of it before it was made and communicated to McQUILLAN.

F. *Withdrawal of the Rights of the Equestrian Distributorship.*

100. In or about the Spring of 1982, defendants BTR, SORBOTHANE, KENNETH M. LEIGHTON, KENNETH B. LEIGHTON and SPECTRUM SPORTS, INC. devised a scheme to acquire plaintiffs' athletic distributorship without paying fair value and without risking of the legal consequences of an outright termination without cause.

101. In or about the Spring of 1982, plaintiffs' research and testing program for equestrian sorbothane products had reached the point where a prototype horseshoe pad for certain segments of the market was available. Further research and testing was being done by SHIRLEY McQUILLAN with the expectation that a horseshoe pad and other products to service a broader segment of the equine market would be available in the near future.

102. Because of the enormous potential of this market, and KENNETH M. LEIGHTON's desire to reap the profits from that market, KENNETH M. LEIGHTON determined that SHIRLEY McQUILLAN would never be given national equestrian distribution rights.

103. Knowing, however, of SHIRLEY McQUILLAN's desire for the equestrian distributorship rights, both because of the enormous profit potential of that market and because of her background and expertise in the care of horses, KENNETH M. LEIGHTON decided to use the national equestrian rights as a means of causing plaintiffs to give up their athletic distributorship.

104. In or about the Spring, 1982, KENNETH M. LEIGHTON informed SHIRLEY McQUILLAN that "because of the enormous potential of the equestrian market" she would have to give up her athletic distributorship in order to be given equestrian distribution rights.

105. She was later informed that she could not sell her athletic distributorship to anyone, but must deliver it to KENNETH B. LEIGHTON on terms acceptable to him and that if she did not do so, the equestrian distribution rights would be given to someone else.

106. Fearful of her loss of the benefit of the work she had done in the development of equestrian products, SHIRLEY McQUILLAN attempted to negotiate a sale of her athletic distributorship to KENNETH B. LEIGHTON. KENNETH B. LEIGHTON refused to negotiate in good faith and the sale could not be consummated.

107. Thereafter, and on the pretext that her involvement in the athletic distributorship precluded her from devoting the time and attention necessary to develop the equestrian distributorship, KENNETH M. LEIGHTON informed SHIRLEY McQUILLAN that she would not be the equestrian distributor.

108. At the time KENNETH M. LEIGHTON demanded that SHIRLEY McQUILLAN sell her athletic distributorship to KENNETH B. LEIGHTON in order to obtain the distribution rights for equestrian products, KENNETH M. LEIGHTON had no intention of actually giving her those rights in the event a sale of her athletic distributorship were made. On the contrary, KENNETH M. LEIGHTON intended to purport to grant SHIRLEY McQUILLAN equestrian distribution rights and then terminate those rights, on a pretext, within a period of six months.

109. In late spring and early summer of 1982, McQUILLAN and Ohio Cushions discussed the possibility of McQUILLAN's selling her distributorship to Ohio Cushions. She proposed a sale price of $400,000 which was rejected by Ohio Cushions. Discussions went no further.

110. Maurice Hiles, the inventor of sorbothane, was so outraged by the conduct of KENNETH M. LEIGHTON that he complained to KENNETH M. LEIGHTON's superior and assured SHIRLEY McQUILLAN that KENNETH M. LEIGHTON could not take the equestrian distribution rights away from her. Mr. Hiles encouraged her to continue with her research and development program for sorbothane equestrian products.

111. Ultimately, when another company was made the equestrian distributor of sorbothane products, Maurice Hiles assisted SHIRLEY McQUILLAN in obtaining distribution rights for a horseshoe pad using a competing product of SORBOTHANE. Maurice Hiles did so, in part, out of disgust for the way in which SHIRLEY McQUILLAN had been treated by BTR, KENNETH M. LEIGHTON, and SORBOTHANE.

112. SHIRLEY McQUILLAN's venture with this competing horseshoe pad was unsuccessful due to limitations in the product and due to the efforts of SORBOTHANE in stifling competition.

113. As of February, 1983, plaintiffs had invested approximately $170,000 in time and money in the development of sorbothane equestrian products. In or about January or February, 1983, SORBOTHANE began marketing equestrian products through a distributor known as Sterivet. Sterivet was provided with the product of SHIRLEY McQUILLAN's research and development.

114. The sorbothane horseshoe pads marketed by SORBOTHANE through Sterivet in or about January or February 1983 were virtually identical to the prototype horseshoe pad that had been developed by SHIRLEY McQUILLAN prior to her termination as equestrian consultant and equestrian distributor.

115. In addition, SORBOTHANE provided other companies, such as the Leyland & Birmingham Rubber Company of the United Kingdom, with the designs and prototyped horseshoe pads developed by SHIRLEY McQUILLAN.

116. As of September, 1983, the value of the right to distribute sorbothane equestrian products was approximately $1,484,000.

117. Defendant SORBOTHANE planned to have a national distributor for its equestrian products and discussions with plaintiff SHIRLEY McQUILLAN concerning her undertaking the distribution of equestrian sorbothane products on a national basis. Because SORBOTHANE desired to have a national equestrian distributor and because it became apparent that plaintiff SHIRLEY McQUILLAN could not satisfactorily sell certain sorbothane products within the sales territory in which she was selling insoles and at the same time undertake concurrently design and develop successfully equestrian applications for the patented sorbothane material, SORBOTHANE gave plaintiff SHIRLEY McQUILLAN the option of choosing between continuing the existing relationship with it or relinquishing that relationship and replacing it with equestrian applications for sorbothane.

118. Plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES refused this offer. KENNETH M. LEIGHTON informed her at that time that she could maintain the existing relationship but would not be considered for the equestrian distributorship. This was done orally and by letter of July 2, 1982.

119. SORBOTHANE hired Kent Vasko, D.V.M. as a consultant for the purpose of developing a sorbothane horseshoe pad. As a result of his activities, Dr. Vasko was able to develop a variety of horseshoe pads made of sorbothane which pads were sold on a national basis, beginning in late 1982, through an Ohio company known as Sterivet.

120. Defendants HAMILTON-KENT, SORBOTHANE and KML did not in any way pressure plaintiff SHIRLEY McQUILLAN dba SORBOTURF

ENTERPRISES to sell her distributorship to defendant SPECTRUM SPORTS, INC. ("SPECTRUM SPORTS, INC.").

G. *The Alleged Theft of the Horseshoe Pad Concept.*

121. Based on SHIRLEY McQUILLAN's ideas and designs, and following meetings with SHIRLEY McQUILLAN in California, Maurice Hiles filed a patent application for a sorbothane horseshoe pad in the United Kingdom. Thereafter, and in or about 1981, Mr. Hiles filed a similar patent application in the United States.

122. Maurice Hiles has acknowledged the contribution of SHIRLEY McQUILLAN to the development of the horseshoe pad and the patent. In consideration for SHIRLEY McQUILLAN's assistance to Maurice Hiles in the development of a patentable sorbothane horseshoe pad, and in part consideration for her continued assistance in the research, development and testing of various horseshoe pads using sorbothane, Maurice Hiles orally agreed to share whatever royalties he received from the patent with SHIRLEY McQUILLAN.

123. Because the concept of the horseshoe pad using sorbothane was developed while Maurice Hiles was consultant to BTR and HAMILTON-KENT, Maurice Hiles acknowledged an obligation to assign the patent to HAMILTON-KENT and did so assign the patent in consideration for a royalty on sales of sorbothane horseshoe pads.

124. When the equestrian distribution rights were taken from SHIRLEY McQUILLAN by KENNETH M. LEIGHTON, Maurice Hiles informed KENNETH M. LEIGHTON of his strong objection to the taking of

those rights particularly in light of SHIRLEY McQUILLAN's contribution to the horseshoe pad patent.

125. Because of Mr. Hiles' strong objection to KENNETH M. LEIGHTON's termination of SHIRLEY McQUILLAN's equestrian distribution rights, and because of SHIRLEY McQUILLAN's contribution to the patent, KENNETH M. LEIGHTON decided to transfer the patent rights out of the name of Maurice Hiles.

126. In furtherance of that scheme, KENNETH M. LEIGHTON, without the knowledge of Maurice Hiles, instructed Kent Vasko, the individual who had replaced SHIRLEY McQUILLAN as the equestrian consultant to sorbothane, to contact John Renner, the patent attorney who was then processing the Maurice Hiles patent application.

127. Since KENNETH M. LEIGHTON, on behalf of SORBOTHANE, INC., was paying for the services of Mr. Renner, KENNETH M. LEIGHTON was able to and did instruct Mr. Renner to file an application for a horseshoe pad patent virtually identical to the Hiles' patent application in the name of Kent Vasko. John Renner was instructed by KENNETH M. LEIGHTON to assist Kent Vasko in the processing of a horseshoe pad patent application and to abandon the Hiles patent application.

128. At the direction of KENNETH M. LEIGHTON, Mr. Renner failed to pursue the patent application filed in the name of Hiles, resulting in the "abandonment" of that application in or about March, 1984. Mr. Hiles was never informed of the fact that the patent application filed in his name had been abandoned by Mr. Renner.

129. With the assistance of Mr. Renner, Mr. Vasko was able to and did pursue his patent application to completion and in or about January, 1986, the horseshoe pad patent issued in the name of Kent Vasko in the U.S. Patent Office.

130. That patent was assigned to SORBOTHANE, INC. by Kent Vasko in exchange for royalties on the sale of sorbothane equestrian products.

131. The patent application issued in the name of Kent Vasko and assigned to SORBOTHANE, INC. incorporates the original ideas and design concepts of SHIRLEY McQUILLAN.

132. Any equestrian applications for sorbothane material actually manufactured and marketed by the defendants were based on their own research and development efforts, and not on work by plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES.

H. *Alleged Antitrust Claims.*

133. As of at least the date of the consummation of the oral agreement designating plaintiffs as the Southwestern United States distributor for SORBOTHANE products, and continuing until the present, defendants, and each of them, along with others including IEM Orthopedics, the national distributor for medical sorbothane products, have knowingly entered into and participated in a continuing combination and conspiracy in unreasonable restraint of trade in violation of the Sherman Act and the Clayton Act.

134. The activities of defendants in this regard were designed to accomplish the following anticompetitive goals:

a. To establish and maintain resale prices for sorbothane products at both the wholesale and retail levels;

b. To eliminate all independent distributors of sorbothane athletic products except for SPECTRUM SPORTS, INC., and to establish SPECTRUM SPORTS, INC. as the sole and exclusive nationwide distributor for sorbothane sport shoe products and sheet stock in order to establish and maintain resale prices for sorbothane products at both the wholesale and retail levels and to further defendants' monopoly in the relevant market;

c. To fix prices and allocate markets and territories among distributors so as to eliminate price competition for sorbothane products and artificially inflate and support the price of certain sorbothane products (such as medical products);

d. To enforce minimum price schedules and eliminate retailers who refused to conform to price schedules and anti-discounting policies dictated by members of the conspiracy;

e. To use the distributors to establish markets for sorbothane products in their respective distribution territories and then terminate distribution agreements with the distributors, refuse to sell sorbothane products to plaintiffs and deliver their territories to co-conspirators SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON;

f. To enforce exclusive dealing arrangements whereby distributors were precluded from dealing in competitors' products;

g. To monopolize and/or attempt to monopolize the market for shock absorbent athletic shoe inserts and sheet stock and the submarket for sorbothane shoe inserts and sheet stock nationwide.

135. In addition, defendants BTR, HAMILTON-KENT, SORBOTHANE, and KENNETH M. LEIGHTON have, since at least July 1980, knowingly entered into and participated with each other and with others including the Leyland & Birmingham Rubber Company Ltd., BTR Kennon, Sanshin Enterprises, and BTR Marketing Company, in a continuing contract, combination and conspiracy in unreasonable restraint of trade in violation of the Sherman Act by engaging in the following conduct:

a. The allocation of world markets for the sale of sorbothane products;

b. The imposition of restrictions on the sale of sorbothane products from and into the United States by members of the conspiracy;

c. The boycott of potential purchasers of sorbothane products who failed to comply with such unreasonable resale restrictions imposed for anticompetitive purposes;

d. The fixing of prices for sorbothane products;

e. The elimination of competitors and potential competitors by coercing the patent holder to withhold the granting of additional licenses to manufacture sorbothane;

f. The boycott of suppliers of members of the conspiracy and other coercive conduct designed to cause suppliers to refuse to supply materials to nonmembers of the conspiracy;

g. Entering into restrictive Agreements with suppliers of component products used in the manufacture of sorbothane;

h. Threatening patent infringement litigation to anyone who attempts to manufacture a polymer shock absorbent material in order to discourage competitors and potential competitors; and

i. Monopolizing, attempting to monopolize and conspiring to monopolize the market for the manufacture and sale of athletic shoe inserts, polymer shock absorbent shoe inserts, Sorbothane equestrian products and sorbothane products worldwide.

136. In furtherance of the combination and conspiracy referred to in paragraphs 133 and 134, defendants, and each of them, engaged in the following acts among others:

a. Intentionally misrepresenting to plaintiffs the nature and duration of their distributorship rights for sorbothane products;

b. Intentionally misrepresenting to plaintiffs that a written distributorship agreement embodying the essential terms and conditions agreed upon would be promptly prepared and executed by HAMILTON-KENT/SORBOTHANE;

c. Establishing wholesale prices to be charged by distributors to retail outlets and insisting that distributors not set prices below the published price list or permit volume discounts or other price incentives upon pain of loss of their distributorship;

d. Requiring distributors as a condition to maintaining their distributorship, to enforce resale price agreement with retailers and police retailers to insure that retailers were not engaging in price cutting or discounting in violation of established retail prices set by defendants;

e. Prohibiting distributors from selling sorbothane products to discount stores or other prohibited retail outlets;

f. Prohibiting distributors from dealing in competitors' products;

g. Engaging in conduct intended to frustrate distributors and cause distributors to relinquish their distributorship after markets had been developed within their territory including engaging in those acts referred to in paragraph 139 above.

137. In furtherance of the contract, combination and conspiracy, defendants BTR, HAMILTON-KENT, SORBOTHANE and KENNETH M. LEIGHTON engaged in the following additional acts in concert with each other and with the other members of the conspiracy referred to in paragraph 135:

a. Allocating world markets for the sale of sorbothane products and agreeing that sales by each manufacturer of sorbothane products would be limited to defined territories;

b. Restricting sales into and out of the United States by members of the conspiracy;

c. Engaging in group boycotts of suppliers who failed to comply with anticompetitive restrictions;

d. Engaging in group boycotts of purchasers and potential purchasers of sorbothane products who failed to comply with resale restrictions;

e. Entering into and enforcing horizontal price fixing agreements;

f. Threatening baseless litigation to deter and frustrate competitors;

g. Coercing the patent holder to restrict additional licenses in order to further the unlawful goals of the conspiracy and to perpetuate the monopoly on shock absorbent products held by members of the conspiracy in their respective markets;

h. Causing the transfer of the Hiles' patent application to Kent Vasko without the knowledge or consent of Maurice Hiles or SHIRLEY McQUILLAN;

i. Coercing the patent holder to restrict additional licenses in order to further the contracts, conspiracies and agreements in restraint of trade referred to hereinabove.

138. Defendants HAMILTON-KENT and SORBOTHANE acted independently and separately as to all of their business decisions regarding their relationship with plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES, and did not combine, contract or conspire with any other independent person or entity in this regard.

139. Defendants' initial decision to not sell a full range of products to plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES and, ultimately to not sell any products to plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES, was made based on independent and sound business judgment, and was not the result of any contract, combination or conspiracy with any other independent entity or was not done with the intent to achieve monopoly power in any relevant line of commerce.

140. Under the antitrust claims, the relevant geographic market is the United States.

141. The relevant products markets are athletic shoe shock absorbing inserts and polymer shock absorbent sporting shoe inserts and sheet stock. Sorbothane shoe inserts and sheet stock is a relevant product submarket.

142. The conspiracy in restraint of trade and actions taken in furtherance of the conspiracy occurred in the interstate commerce of the United States. Because of their substantial resources and market power, defendants held and exercised monopoly power in the relevant geographic and product markets and submarkets or had a dangerous probability of success in their attempts to obtain monopoly power in the relevant product and geographic markets and submarkets.

143. At all times material, defendants BTR and SORBOTHANE required distributors of sorbothane products, including plaintiffs, to refrain from dealing in products competitive with those distributed by them as a condition for maintaining their distributorship.

144. One of the reasons for the termination of plaintiffs' distributorship was plaintiffs' involvement in the sale of horseshoe pads using a product competitive with SORBOTHANE.

145. Plaintiffs have been injured in their business and property by reason of the unlawful contracts, combinations and conspiracies in restraint of trade referred to herein and in the monopolization, conspiracy to monopolize and attempts to monopolize the market and submarkets referred to herein.

146. The elimination of plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES from the distribution chain for shock-absorbing material had no undue effect on intrabrand competition, and actually increased interbrand competition.

147. To the extent that any defendants may have discussed engaging in activities which might or would be prohibited by the antitrust laws, defendants by such discussions never contemplated or intended to violate any laws, and never acted upon or in any way implemented those discussions by actual plans or actions.

148. Transportation cost for international shipments of sorbothane material would substantially affect the price, making such shipments competitively impracticable.

149. Under the antitrust claims, the relevant product market is all material having shock absorbent capabilities or properties whether as a shoe insert, O.E.M., or aftermarket.

150. Materials competitive with the patented sorbothane material in the relevant product market include rubber, foam rubber, and other natural and synthetic paddings which are used to provide shock absorbing characteristics in shoes.

151. Competitors of the defendants HAMILTON-KENT and SORBOTHANE in the relevant product market then included and now include, without limitation, Dr. Scholls, Spendco, Supalene, Kind Sole, Therasole and Wingfoot XL.

152. Defendants had and now have an insignificant market share in the relevant geographic and product markets.

153. Defendants did not and presently do not have monopoly power in the relevant geographic and product markets, and did not and presently do not have the ability to exclude competitors or control prices in those markets. Indeed, new competitors entered the market throughout the relevant time period.

154. To the extent that defendants had or have any power in the relevant geographic and product market, it is as the result of superior skills, products, material, lawfully acquired patents and other innocent or legitimate business advantages.

155. Defendants have not monopolized the relevant geographic and product markets.

156. Defendants did not or do not have a dangerous probability of achieving monopoly power.

157. Defendants have not attempted to monopolize the relevant geographic and product markets.

158. Defendants have not conspired to monopolize the relevant and geographic and product markets.

159. To the extent that defendants ever attempted to prevent potential competitors from manufacturing or marketing products competitive to sorbothane material, it was because of Defendants' good faith belief that the potential competitors' proposed products would infringe upon the patent for sorbothane material.

I. *Specific Additional Contract Contentions*

160. Despite repeated representations to the effect that a written agreement would be prepared embodying the oral distributorship agreement, and despite the submission of a proposed written agreement by plaintiffs, defendants have failed and refused to enter into a written distributorship agreement embodying the terms of the oral agreement although at all times material, defendants BTR, SORBOTHANE and HAMILTON-KENT have accepted the performance of plaintiffs under the oral agreement, have induced plaintiffs to perform under the oral agreement and have caused plaintiffs to change their position and to expend

considerable sums of money and amounts of time and energy on the representation that plaintiffs had a valid distributorship of sorbothane products and that the oral agreement would be reduced to writing.

161. At all times material, plaintiffs relied upon the representations regarding their status as distributors and performed under the terms of the oral agreements.

162. On or about August 1, 1983, defendants BTR and SORBOTHANE informed plaintiffs that they would no longer be permitted to purchase sorbothane products from SORBOTHANE and terminated plaintiffs' status as a distributor of sorbothane products. Contrary to promises made to plaintiffs by SORBOTHANE, defendants KENNETH B. LEIGHTON and SPECTRUM SPORTS, INC. were provided with plaintiffs' customer list and were designated as the exclusive national distributor for sorbothane athletic products.

163. Thereafter, KENNETH B. LEIGHTON and SPECTRUM SPORTS, INC. commenced the solicitation of customers in plaintiffs' exclusive territory using plaintiffs' confidential customer list and made sales into plaintiffs' territory.

J. *Specific Contentions Regarding Fraud Claims.*

164. Defendants perpetrated and conspired to perpetrate a fraudulent scheme against plaintiffs that began in or about October, 1980 and has continued through the present.

165. The fraudulent scheme and conspiracy included, among other things, the following:

a. In or about October, 1980, and continuing thereafter, said defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn falsely represented to plaintiff SHIRLEY McQUILLAN that SHIRLEY McQUILLAN would be designated as the exclusive distributor of equestrian products developed from sorbothane if she would devote her time, money and energy in the development of prototype equestrian products and in the development of a market for such products;

b. In or about the Fall of 1981, defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented to plaintiff SHIRLEY McQUILLAN that she was and would remain the exclusive distributor for sorbothane products in the southwestern territory so long as she properly discharged her responsibilities as distributor and used her best efforts to promote and develop the retail market for sorbothane products;

c. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented to plaintiffs that SORBOTHANE and HAMILTON-KENT would provide cooperation and assistance to plaintiffs in the development of a retail market for sorbothane products within plaintiffs' territory;

d. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented to plaintiffs that as new products were developed, plaintiffs would be given consideration for the exclusive right to distribute such products in their territory;

e. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented to plaintiffs that as distributors, plaintiffs would be

treated equally and fairly with other distributors as to credit terms, priority of supply of shipments of sorbothane products, allocation of territories, allocation of funds for national advertising, allocation of new products and other activities engaged in by SORBOTHANE and HAMILTON-KENT for the benefit of the development of the national market;

f. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented to plaintiffs that the establishment of sales goals and sales quotas were fair and based on accurate information and falsely represented the extent of sales by other distributors for purposes of supporting unrealistically high sales goals and unfavorable comparisons with other distributors;

g. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented that plaintiffs' distributorship would not be unreasonably interfered with or terminated;

h. Defendants, through KENNETH M. LEIGHTON, Laurene Heinsohn and KENNETH B. LEIGHTON, falsely represented that plaintiffs should sell their distributorship to SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON so that plaintiffs could be given the nationwide distributorship for equestrian products;

i. Defendants, through KENNETH M. LEIGHTON and Laurene Heinsohn, falsely represented that customer lists must be provided to HAMILTON-KENT and SORBOTHANE for purposes of protecting the interests of all distributors and preventing the improper sales by other distributors into plaintiffs' territory and that such customer lists would be kept confidential and would not be given to other distributors or used to take over plaintiffs' retail accounts.

166. These representations, at the times made, were false and fraudulent, and designed to induce plaintiffs to continue to invest their time, money and energy in the development of markets for sorbothane products and in the development of prototype products for equestrian use and to turn over customer lists to defendants.

167. In truth and in fact, defendants had, at the time of the making of said representations, formed the scheme to induce plaintiffs to develop equestrian products and prototypes and to develop the market for other sorbothane products in the Southwestern United States with the intent of ultimately, without cause, terminating their distributorship and the continued right to distribute sorbothane products within the plaintiffs' territory and absorbing that territory into the sales territory of SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON.

168. Defendants had no intention of designating SHIRLEY McQUILLAN as the exclusive nationwide distributor for equestrian products and fully intended to intimidate, harass and interfere with the ability of the plaintiffs to continue their business as a distributor in order to cause plaintiffs to abandon their distributorship or to sell it to SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON for less than its value.

169. Defendants further intended to employ tactics to discourage and frustrate plaintiffs in the conduct of their business including, without limitation, the manipulation of credit terms and sales quotas, the arbitrary changing of prices, the shipment of defective product, the failure to provide sufficient quantities of product, the misuse of national advertising monies to the disadvantage of plaintiffs, the diversion of plaintiffs'

customer lists and ultimately the wrongful termination of plaintiff's right to continue to sell sorbothane products.

170. At the time the representations referred to above were made, plaintiffs were ignorant of the falsity of said representations but believed them to be true. In reliance on the truth of said representations, plaintiffs invested considerable time, money and energy in the development of markets for sorbothane products and in the development of prototype products for equestrian use and delivered to HAMILTON-KENT and SORBOTHANE a list of their customers for sorbothane products, which list was ultimately delivered to SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON.

171. When the right to distribute sorbothane products was taken from plaintiffs in or about August 1983, plaintiffs had no alternate source of supply of sorbothane products as a result of the unlawful agreements between SORBOTHANE and other manufacturers of sorbothane products, whereby other manufacturers were precluded from selling sorbothane to purchasers in the United States.

172. The actions of defendants, and each of them, were done maliciously, oppressively and fraudulently and with the intent to injure and harass plaintiffs so as to justify an award of punitive and exemplary damages in the sum of at least $5,000,000 to punish and make an example of these defendants.

K. *Specific Contentions Concerning the Racketeer Influenced and Corrupt Organizations Act.*

173. Each of the plaintiffs is a "person" within the meaning of 18 U.S.C. section 1964(c).

174. Each of the defendants is a "person" within the meaning of 18 U.S.C. section 1961(3).

175. At all material times, each corporate defendant, BTR, HAMILTON-KENT, SORBOTHANE, INC. and SPECTRUM SPORTS, INC., was an "enterprise" engaged in, or the activities which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

176. At all material times, plaintiff SORBOTURF ENTERPRISES was an "enterprise" engaged in, or the activities which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

177. At all material times, defendants BTR and SORBOTHANE, INC. were associated in fact and constituted an enterprise engaged in, or the activities which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

178. At all material times, defendants BTR, SORBOTHANE, INC. and HAMILTON-KENT, were associated in fact and constituted an enterprise engaged in, or the activities of which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

179. At all material times, defendants BTR and HAMILTON-KENT were associated in fact and constituted an enterprise engaged in, or the activities of which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

180. At all material times, defendants BTR, SORBOTHANE, INC., and SPECTRUM SPORTS, INC. were associated in fact and constituted an enterprise engaged in, or the activities of which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

181. At all material times, defendants BTR, HAMILTON-KENT, SORBOTHANE, INC., and SPECTRUM SPORTS, INC. were associated in fact and constituted an enterprise engaged in, or the activities of which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

182. At all material times, defendants SORBOTHANE, INC. and SPECTRUM SPORTS, INC. were associated in fact and constituted an enterprise engaged in, or the activities of which affected, interstate commerce within the meaning of 18 U.S.C. section 1961(4).

183. By engaging in the conduct described hereinabove, defendants, and each of them, engaged in a pattern of "racketeering activity" within the meaning of 18 U.S.C. section 1961(1) specifically including, without limitation, act indictable under Title 18 U.S.C. sections 1341 and 1343.

184. Specific examples of the use of the mails in furtherance of the fraudulent schemes, acts and omissions described hereinabove include, but are not limited to, the following:

Date	*Item*
a. August 1, 1983	Letter from KENNETH M. LEIGHTON to SORBOTURF ENTERPRISES purporting to terminate distributorship.
b. March 1, 1983	Letter from KENNETH M. LEIGHTON to SORBOTURF ENTERPRISES discussing purported distribution of Sorbothane products through I.E.M. and Intermark.

c. February 16, 1983	Letter from SORBO, INC. to SORBOTURF ENTERPRISES discussing new distribution system and reiterating request for customer lists.
d. December 7, 1982	Letter from SORBO, INC. to SORBOTURF ENTERPRISES establishing national advertising budget for 1983 and requesting SORBOTURF ENTERPRISES' contribution to that budget.
e. October 28, 1982	Letter from SORBO, INC. to SORBOTURF ENTERPRISES demanding customer list of SORBOTURF ENTERPRISES and threatening change in distribution system "such as in-house sales force."
f. July 2, 1982	Letter from SORBO, INC. to Shirley McCone [McQUILLAN] *re* selling SORBOTURF ENTERPRISES to KENNETH B. LEIGHTON and representing that McCone would not get equestrian market because she would not give up SORBOTURF ENTERPRISES.
g. January 6, 1982	Letter from HAMILTON-KENT to "Dear Distributors" re establishing national medical products distribution.

h. January 27, 1981	Letter from HAMILTON-KENT to Ms. McCone re intent to designate Ms. McCone as distributor for Sorbothane in the Southwest and submit distributors' contract within "two to three weeks."
i. July 23, 1982	Letter from SORBO, INC. to SORBOTURF ENTERPRISES requesting monthly reports including customer lists.
j. February 17, 1982	Letter from HAMILTON-KENT to "Dear Distributors" representing sales forecasts and setting performance level quota for SORBOTURF ENTERPRISES.
k. Undated	Letter from SORBO, INC. to SORBOTURF ENTERPRISES explaining purported reasons for demanding customer lists.

185. The predicate acts of mail fraud and wire fraud committed by the defendants were many, continuous and related. In addition, the predicate acts of mail fraud and wire fraud were directed at multiple victims. In these circumstances, the predicate acts pose a threat of continuing activity.

186. Defendants SORBOTHANE, INC., HAMILTON-KENT, SPECTRUM SPORTS, INC., KENNETH M. LEIGHTON and KENNETH B. LEIGHTON, and each of them, are employed by or are associated with BTR, an enterprise, and have conducted or participated, directly or indirectly, in the conduct of

such enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c).

187. Defendants BTR, HAMILTON-KENT, SPECTRUM SPORTS, INC., KENNETH M. LEIGHTON, and KENNETH B. LEIGHTON, and each of them, are employed by or are associated with SORBOTHANE, INC., an enterprise, and have conducted or participated, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c).

188. Defendants BTR, SORBOTHANE, INC., SPECTRUM SPORTS, INC., KENNETH M. LEIGHTON, and KENNETH B. LEIGHTON, and each of them, are employed by or are associated with HAMILTON-KENT, an enterprise, and have conducted or participated, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c).

189. Defendants, BTR, SORBOTHANE, INC., HAMILTON-KENT, KENNETH M. LEIGHTON and KENNETH B. LEIGHTON, and each of them, are employed by or are associated with SPECTRUM SPORTS, INC., an enterprise, and have conducted or participated, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c).

190. Defendant BTR is employed by or is associated with each of the association-in-fact enterprises identified below, and has conducted or participated,

directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c):

a. BTR and SORBOTHANE, INC.;

b. BTR, SORBOTHANE, INC. and HAMILTON-KENT;

c. BTR and HAMILTON-KENT;

d. BTR, SORBOTHANE, INC. and SPECTRUM SPORTS, INC.;

e. BTR, HAMILTON-KENT, SORBOTHANE, INC. and SPECTRUM SPORTS, INC.; and

f. SORBOTHANE, INC. and SPECTRUM SPORTS, INC.

191. Defendant HAMILTON-KENT is employed by or is associated with each of the association-in-fact enterprises identified below, and has conducted or participated, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c):

a. BTR and SORBOTHANE, INC.;

b. BTR, SORBOTHANE, INC. and HAMILTON-KENT;

c. BTR and HAMILTON-KENT;

d. BTR, SORBOTHANE, INC. and SPECTRUM SPORTS, INC.;

e. BTR, HAMILTON-KENT, SORBOTHANE, INC. and SPECTRUM SPORTS, INC.; and

f. SORBOTHANE, INC. and SPECTRUM SPORTS, INC.

192. Defendant SORBOTHANE, INC. is employed by or is associated with each of the association-in-fact enterprises identified below, and has conducted or participated, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c):

a. BTR and SORBOTHANE, INC.;

b. BTR, SORBOTHANE, INC. and HAMILTON-KENT;

c. BTR and HAMILTON-KENT;

d. BTR, SORBOTHANE, INC. and SPECTRUM SPORTS, INC.;

e. BTR, HAMILTON-KENT, SORBOTHANE, INC. and SPECTRUM SPORTS, INC.; and

f. SORBOTHANE, INC. and SPECTRUM SPORTS, INC.

193. Defendant SPECTRUM SPORTS, INC. is employed by or is associated with each of the association-in-fact enterprises identified below, and has conducted or participated, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c):

a. BTR and SORBOTHANE, INC.;

b. BTR, SORBOTHANE, INC. and HAMILTON-KENT;

c. BTR and HAMILTON-KENT;

d. BTR, SORBOTHANE, INC. and SPECTRUM SPORTS, INC.;

e. BTR, HAMILTON-KENT, SORBOTHANE, INC. and SPECTRUM SPORTS, INC.; and

f. SORBOTHANE, INC. and SPECTRUM SPORTS, INC.

194. Defendant KENNETH M. LEIGHTON is employed by or is associated with each of the association-in-fact enterprises identified below, and has conducted or participated, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c):

a. BTR and SORBOTHANE, INC.;

b. BTR, SORBOTHANE, INC. and HAMILTON-KENT;

c. BTR and HAMILTON-KENT;

d. BTR, SORBOTHANE, INC. and SPECTRUM SPORTS, INC.;

e. BTR, HAMILTON-KENT, SORBOTHANE, INC. and SPECTRUM SPORTS, INC; and

f. SORBOTHANE, INC. and SPECTRUM SPORTS, INC.

195. Defendant KENNETH B. LEIGHTON is employed by or is associated with each of the association-in-fact enterprises identified below, and has conducted or participated, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c):

a. BTR and SORBOTHANE, INC.;

b. BTR, SORBOTHANE, INC. and HAMILTON-KENT;

c. BTR and HAMILTON-KENT;

d. BTR, SORBOTHANE, INC. and SPECTRUM SPORTS, INC.;

e. BTR, HAMILTON-KENT, SORBOTHANE, INC. and SPECTRUM SPORTS, INC.; and

f. SORBOTHANE, INC. and SPECTRUM SPORTS, INC.

196. Defendants, and each of them, have received income derived, directly or indirectly, from a pattern of racketeering activity, and have used or invested, directly or indirectly, such income, or the proceeds of such income, in the acquisition of an interest in, or the establishment or operation of, BTR, SORBOTHANE, INC., HAMILTON-KENT and SPECTRUM SPORTS, INC., and each of them, in violation of 18 U.S.C. section 1962(a).

197. Defendants, and each of them, have, through a pattern of racketeering activity, acquired and maintained ownership and control over the business and customer accounts of plaintiff SORBOTURF ENTERPRISES, an enterprise which is engaged in or which affects interstate commerce in violation of 18 U.S.C. section 1962(b).

198. Defendants, and each of them, have, through a pattern of racketeering activity, acquired or maintained an interest in or controlled BTR, HAMILTON-KENT, and SORBOTHANE, INC., each of which are enterprises, in violation of 18 U.S.C. section 1962(b).

199. Defendants, and each of them, alleged in the aforesaid violations of 18 U.S.C. section 1962(a), (b) and (c), and each of them, conspired among themselves and with each other to commit and conceal the aforesaid violations of 18 U.S.C. sections 1962(a), (b) and (c), and each of them, in violation of 18 U.S.C. section 1962(d).

200. As a direct and proximate result of defendants' violations of 18 U.S.C. sections 1962(a), (b), and (c), plaintiffs have sustained injury to their business and property.

201. To the extent that any predicate acts under the RICO Act were committed by the defendants, such acts were never intended or contemplated to violate any laws and were not part of an ongoing, open-ended scheme, but rather were part of the same episode.

202. None of the defendants engaged in conduct prohibited by the RICO act.

203. None of the defendants, either alone or in combination, constitute an enterprise under the RICO act.

204. Neither the Plaintiffs, nor the business SORBOTURF ENTERPRISES, constitute an enterprise under the RICO act.

L. *Specific Contentions With Regard to Breach of the Implied Covenant of Good Faith and Fair Dealing.*

205. Defendants, BTR, HAMILTON-KENT and SORBOTHANE have used their superior economic power over plaintiffs and have attempted to shield themselves, and each of them, from liability to plaintiffs by denying, in bad faith and without probable cause, that an agreement existed for the distribution of sorbothane athletic and equestrian products. By said conduct and the conduct referred to hereinabove, defendants BTR, HAMILTON-KENT and SORBOTHANE have breached the implied covenant of good faith and fair dealing.

206. The actions of said defendants, and each of them, in denying in bad faith the existence of such agreements was done maliciously, oppressively and fraudulently and with the intent to harass and injure plaintiffs so as to justify an award of punitive and exemplary damages in the amount of at least $5,000,000 to punish and make an example of these defendants.

M. *Specific Contentions With Regard to claim for Interference With Prospective Advantage.*

207. As of September 1983, plaintiffs had developed a valuable economic relationship with their retail customers and an expectancy of additional profitable business.

208. Defendants, and each of them, by the wrongful acts referred to above, intentionally and/or negligently interfered with that valuable economic relationship and interfered with the contractual rights between plaintiffs and SORBOTHANE as distributors of athletic and equestrian products.

N. *Damages.*

209. By reason of the wrongful conduct of defendants, plaintiffs have suffered damages measured by the loss of the equestrian and athletic distribution rights which rights had a value of at least $3.687 million as of September 30, 1983.

210. By reason of defendants' conduct as referred to hereinabove, plaintiffs suffered damage in the form of mental and emotional distress.

211. Plaintiffs have suffered additional damages including injury to their reputation, loss of goodwill and damage to their credit.

212. Plaintiffs have retained the law firm of Gray, Cary, Ames & Frye to represent them in the preparation and maintenance of this lawsuit. Considerable attorneys' fees and expenses, valued in excess of $500,000, have been and will continue to be incurred in order to bring this matter to final judgment.

213. At all times in dealing with plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES, Defendants HAMILTON-KENT, SORBOTHANE and KML were above board and fair. Specifically, defendants did *not* engage in any illegal, improper, prohibited or fraudulent acts and practices which they are accused of performing with respect to their day-to-day dealings with plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES.

214. To the extent that defendants made any representations to plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES which subsequently were not realized, such representations were made with a bona fide belief as to their truthfulness at the time made, or were not representations of existing or past facts.

215. No fiduciary or special relationship existed between or among plaintiff SHIRLEY McQUILLAN dba SORBOTURF ENTERPRISES and defendants, and all dealings were at arms length.

VII

The parties have filed the exhibits to be offered at trial in a separate document.

VIII

The following are the lists of witnesses to be called by plaintiff and defendants.

LIST OF PLAINTIFFS' WITNESSES

Plaintiffs intend to call the following witnesses to testify at the time of trial. Plaintiffs reserve the right not to call any of the witnesses identified below.

1. Thomas Alley, Allied Biomechanical Technologies, Inc., 517C Jacoby Street, San Rafael, California 94901.

2. Swede Anderson, 849 Beryl, Pacific Beach, California.

3. Steve Bailey, Sterivet Labs, Inc., 20102 Progress Drive, Strongsville, Ohio 44136.

4. Martin R. Bloomenstein, CPA, 1109 West San Bernardino Road, Suite 200, Covina, California.

5. Robert Boyd, 2144 State Route 59, Kent, Ohio 44240.

6. John M. Burne, IEm Orthopaedics, 251 West Garfield Road, Suite 292, Aurora, Ohio 44202.

7. John C. Cahill, BTR, Inc., 1 Hospital Trust Tower, Providence, Rhode Island 02906.

8. Thomas R. Capehart, 283 South Lake Avenue, Suite 230, Pasadena, California 91101.

9. Steve Eisner, Paradise Valley, Arizona.

10. John Farrell Fay, 1400 Sixth Avenue, Suite 211, San Diego, California 92101.

11. James A. Forsyth, Sorbothane, 2144 State Route 59, Kent, Ohio 44087.

12. Robert Gravel, address presently unknown.

13. Laurene Heinsohn, 567 Hampshire Road, Apt. 202E, Westlake Village, California 91361.

14. Maurice Hiles, 234 Silver Valley Boulevard, Monroe Falls, Ohio 442162.

15. Ken Hills, Ph.D., Science Technology Transfer Division, British Technology Group, 101 Newington Causeway, London SE16BU, England.

16. Daniel S. Kaplan, Esq., Adler, Pollock & Sheetan, Inc., 2300 Hospital Trust Tower, Providence, Rhode Island 02903.

17. Gordon D. Kinder, Maky, Renner, Otto & Beisselle, One Public Square, Cleveland, Ohio 44113.

18. KENNETH B. LEIGHTON, JR., Spectrum Sports, 2069 Midway Drive, Twinsburg, Ohio 44087.

19. KENNETH M. LEIGHTON, 343 Trails End, Aurora, Ohio.

20. Myron McCone, R.H.R., Inc., Star Route No. 2, Box 650, Rhinelander, Wisconsin 54501.

21. LARRY McQUILLAN, 7783 Falda Place, Carlsbad, California 92008.

22. SHIRLEY McQUILLAN, 7783 Falda Place, Carlsbad, California 92008.

The qualifications of this expert witness and the substance of her testimony are generally set forth in the deposition transcript of Shirley McQuillan dated 3/17/87.

23. Jerry Miller, 5750 Som Center Road, Solon, Ohio 44139.

24. William Peoples, Force 10, Inc., Lehigh Valley, Pennsylvania 18001.

25. John Renner, Maky, Renner, Otto & Beisselle, One Public Square, Cleveland, Ohio 44113.

26. Roberta Spoon, Steres, Alpert & Carne, 1901 First Street, San Diego, California 92101.

27. Dennis Thompson, address presently unknown.

28. Kent Allen Vasko, 225 E. Pioneer Trail, Aurora, Ohio 44202.

29. Martin M. Vogel, 21 E. Industry Court, Deer Park, New York 11729.

30. James H. West, Johnston, Turnquist and Schmitt, 2550 Fifth Avenue, Suite 1009, San Diego, California 92103.

The qualifications of this expert witness and the substance of his testimony are set forth in the deposition transcript of James West dated 3/11-12/87.

31. Any and all other witnesses listed on defendants' witness list.

DEFENDANTS SPECTRUM SPORTS, INC. AND KENNETH B. LEIGHTON'S LIST OF WITNESSES.

It is expected that the Defendants will call the following witnesses at trial.

1. KENNETH B. LEIGHTON, 2069 Midway Drive, Twinsburg, Ohio 44087.

2. Michael J. Silvestro, 2069 Midway Drive, Twinsburg, Ohio 44087.

3. Kenneth M. Leighton, 343 Trails End, Aurora, Ohio.

4. Such witnesses as may appeal on the witness list of co-defendants BTR, INC., SORBOTHANE, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC., and KENNETH M. LEIGHTON.

DEFENDANTS SORBOTHANE, INC., BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY AND KENNETH M. LEIGHTON'S LIST OF WITNESSES.

It is expected that the Defendants will call the following witnesses at trial.

1. Robert Boyd, Sorbothane, Inc., 2144 State Route 59, Kent, Ohio 44240.

2. Kenneth M. Leighton, 160 West Garfield Street, Aurora, Ohio 44202.

3. James Forsyth, 2144 State Route 59, Kent, Ohio 44240.

4. Dr. Richard Olsen (expert witness), Applied Business Research, Inc., 20 Lafayette Circle, Wellesley, Massachusetts 02181. (resume attached)

Dr. Olsen will testify to the matters on which he expressed an opinion in his deposition which for summary purposes may be stated as follows. He will testify as to the dynamics of the marketplace in the market for Sorbothane athletic products and other competitive products and will give a profile from a business standpoint of Plaintiff, Shirley McQuillan's, operations and marketing approach for Sorboturf Enterprises, and may also testify as to similar matters for the market for Sorbothane equestrian products and Shirley McQuillan's marketing plans therfor.

5. John Cahill, BTR plc, Silvertown House, Vincent Square, London, England SW 1 PsPL.

6. Kent Vasko (expert witness and fact witness), 225 East Pioneer Trail, Aurora, Ohio 44202. (resume attached)

Dr. Vasko's expert testimony will focus on the development of the horseshoe pad. He will testify that the horseshoe pad and other equestrian products patented and marketed by Sorbothane are significantly different from the equestrian product conceived by Shirley McQuillan. He will also testify as to the equestrian market for the pads and other products.

7. Michael Byrne (expert witness), Price Waterhouse, 600 "B" Street, San Diego, California 92101. (resume attached)

Mr. Byrne will testify as to the matters on which he expressed opinions in his deposition which for summary purposes may be stated as follows: He will testify to the value of the Plaintiff's business during the relevant time and will critique the Plaintiff's damage approach. He may also be called upon to provide rebuttal testimony to plaintiff's evidence of damage in the equestrian area.

8. Ted Jardine, 5171 San Aquario Drive, Pacific Beach, California.

9. Alby Jardine, 5171 San Aquario Drive, Pacific Beach, California.

10. Martin Bloomenstein, 1109 West San Bernardino Road, Suite 200, Covina, California 91722.

11. Records Keeper, Sorbothane, Inc., 2144 State Route 59, Kent, Ohio.

12. Records keeper or other representative of American Horse Council, 1700 K St. N.W. No. 300, Washington, DC.

13. Desmond & Marcello, through Glenn M. Desmond (expert witness) or Aaron D. Amster (expert witness), 13160 Mindanao Way, Suite 270, Marina del Rey, California 90292. (resumes attached)

Mr. Desmond and/or Mr. Amster will testify as rebuttal expert witnesses on the proper and accepted methods of valuing businesses, in particular the business of Plaintiffs. They will also testify that the valuation method used by Mr. West, Plaintiffs' expert, is flawed.

14. Christopher Risley, 72 Kent Street, Brookline Massachusetts.

15. John W. Renner, Renner, Otto, Boisselle & Lyon, 12th Floor, One Public Square, Cleveland, Ohio 44113.

16. Ron Sauner, 110 West C St., Suite 1211, San Diego, CA.

17. James F. O'Connor, CPA, Managing Director, Ingoldsby, O'Connor & Company, 45 William St., Wellesley, MA (expert witness).

Mr. O'Connor is a 1962 graduate of Boston College where he obtained a B.A. He is a certified public accountant.

IX

The following issues of law, and no others, remain to be litigated upon the trial.

A. *Federal Antitrust Claims.*

1. Did any defendant violate section 1 of the Sherman Act, title 15 U.S. Code, by engaging in a market allocation among the other manufacturers of sorbothane products?

2. Did any defendant violate section 1 of the Sherman Act, title 15 U.S. Code, by engaging in vertical price-fixing of sorbothane products?

3. Did any defendant violate section 1 of the Sherman Act, title 15 U.S. Code, by engaging in a group boycott?

4. Did any defendant violate section 2 of the Sherman Act, 15 U.S. Code, by monopolizing, attempting to monopolize, or conspiring to monopolize the market for sorbothane products?

5. Does SORBOTURF ENTERPRISES have standing to complain of the alleged federal antitrust violations?

6. Did SORBOTURF ENTERPRISES suffer any injury by reason of the alleged violations of the federal antitrust laws?

7. Is SORBOTURF ENTERPRISES' alleged injury of the type the federal antitrust laws are designed to prohibit?

8. Is SORBOTURF ENTERPRISES entitled to recover from the defendants' treble damages and costs of suit, including reasonable attorneys' fees, by reason of the alleged violations of the federal antitrust laws?

9. Does this Court apply the *per se* rule or the rule of reason to the defendants' alleged violations of the federal antitrust laws?

10. Did defendants engage in concerted action through a contract, combination or conspiracy which resulted in an unreasonable restraint of trade and damage to SORBOTURF ENTERPRISES?

11. Is there a plurality of independent actors who have acted in concert under the claims under Section 1 of the Sherman Act?

12. What is the relevant geographic and product market under the section 2 claims of the Sherman Act?

13. What is the relevant geographic and product market in the claims under Section 1 of the Sherman Act should the rule of reason analysis apply?

14. Did any defendant have monopoly power in the relevant market?

15. Did any defendant willfully acquire or maintain monopoly power in the relevant market?

16. Did any defendant have the specific intent to control prices or destroy competition in the relevant market?

17. Did any defendant engage in predatory or anticompetitive conduct directed at accomplishing control of prices or destroying competition in the relevant market?

18. Was there a dangerous probability that any defendant could succeed in controlling prices or destroying competition in the relevant market?

19. Did any defendant engage in concerted anticompetitive action deliberately entered into with the specific intent to accomplish the unlawful result of achieving a monopoly?

B. *The Claims Under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1961 et seq. ("RICO").*

1. Did any defendant violate section 1962(a), title 18 U.S. Code—the RICO Act?

2. Did any defendant violate section 1962(b), title 18 U.S. Code—the RICO Act?

3. Did any defendant violate section 1962(c), title 18 U.S. Code—the RICO Act?

4. Did any defendant violate section 1962(d), title 18 U.S. Code—the RICO Act?

5. Did any defendant commit mail or wire fraud in violation of sections 1341 and 1343, respectively, title 18 U.S. Code?

6. Do the alleged racketeering acts of the defendants constitute a "pattern of racketeering activity"?

7. Do the alleged "enterprises" have the following characteristics: (a) an ongoing organization; (b) a continuing unit with a common purpose; and (c) a separation between the "enterprise" and the alleged racketeering acts?

8. Are the "enterprises" alleged in the claims under section 1962(c), title 18 U.S. Code, distinct from the defendants in each of the alleged violations?

9. Are the "enterprises" alleged in the claims under sections 1962(a) and (b) the direct or indirect beneficiaries of the pattern of racketeering in which it allegedly engaged?

10. In the claims based on section 1962(c), title 18 U.S. Code, are the defendants employed by or associated with the alleged enterprises, and have they conducted or participated in the conduct of such enterprises' affairs through a pattern of racketeering activity?

11. Does the doctrine of respondeat superior apply in civil RICO cases?

12. What is the burden of proof that SORBOTURF ENTERPRISES must sustain to prove its civil RICO claims?

13. Is SORBOTURF ENTERPRISES entitled to recover from the defendants treble damages and costs of suit, including reasonable attorneys' fees, by reason of the defendants' alleged violations of section 1962, title 18 U.S. Code—the RICO Act?

C. *Claims Under State Antitrust Law: Cartwright Act, Cal. Bus. & Prof. Code §16720 et seq.*

1. Did any defendant violate section 1660 or section 1670 of the California Business and Professions Code—the California Cartwright Act?

2. Is SORBOTURF ENTERPRISES entitled to recover treble damages and costs of suit, including reasonable attorneys' fees, caused by reason of the defendants' alleged violations of the California Cartwright Act?

D. *Breach of Contract Claims.*

1. Did an enforceable contract exist between BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) and SORBOTURF ENTERPRISES?

2. Did BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) breach an oral contract with SORBOTURF ENTERPRISES?

3. Did the alleged oral contract between BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) and SORBOTURF ENTERPRISES have sufficient consideration?

4. Are BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) bound to perform certain duties with SORBOTURF ENTERPRISES under the doctrine of promissory estoppel?

5. Is the alleged oral contract between BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) and SORBOTURF ENTERPRISES unenforceable under the statute of frauds?

6. Are BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) estopped from asserting the statute of frauds?

7. Did BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) have the right to terminate the alleged oral contract with SORBOTURF ENTERPRISES?

8. Was the alleged oral contract between BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC. and SORBOTHANE, INC. (aka SORBO, INC.) and/or SORBOTURF ENTERPRISES terminable at will?

9. Was the alleged oral contract between BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) and SORBOTURF ENTERPRISES terminable only with cause?

10. Was the alleged oral contract between BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka

SORBO, INC.) and SORBOTURF ENTERPRISES terminable only upon reasonable notice after a reasonable time has elapsed?

11. Did SORBOTURF ENTERPRISES breach the alleged contract between BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) and SORBOTURF ENTERPRISES?

12. Is SORBOTURF ENTERPRISES entitled to recover damages against BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) for breach of the alleged oral contract?

E. *Fraud Claims.*

1. Did any defendant commit fraud upon SORBOTURF ENTERPRISES?

2. Did any defendant misrepresent material facts to SORBOTURF ENTERPRISES?

3. Did any defendant have a duty to disclose material facts to SORBOTURF ENTERPRISES?

4. Did any defendant conceal or fail to disclose material facts to SORBOTURF ENTERPRISES?

5. Did any defendant make the alleged false representation with knowledge of its falsity or without reasonable grounds for believing it to be true?

6. Did any defendant make the alleged false representation with the intent to induce SORBOTURF ENTERPRISES to act in reliance upon it?

7. Did SORBOTURF ENTERPRISES rely upon the defendants' alleged misrepresentation(s)?

8. Did SORBOTURF ENTERPRISES have knowledge of the falsity of the alleged misrepresentation(s) at the time they were allegedly made by the defendants?

9. Did SORBOTURF ENTERPRISES have the right to rely on the alleged misrepresentation(s) of the defendants?

10. Did SORBOTURF ENTERPRISES reasonably believe that the alleged misrepresentations were true?

11. Was any reliance of SORBOTURF ENTERPRISES on the alleged misrepresentations reasonable or justifiable?

12. Was SORBOTURF ENTERPRISES damaged by reason of its reliance on the alleged misrepresentations?

13. Is SORBOTURF ENTERPRISES entitled to compensatory damages proximately caused by the alleged misrepresentations of the defendants?

14. Is SORBOTURF ENTERPRISES entitled to punitive damages by reason of the alleged fraud committed by the defendants?

F. *Conversion.*

1. Did defendants, BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC., SORBOTHANE, INC. (aka SORBO, INC.) or KENNETH M. LEIGHTON convert the property of SORBOTURF ENTERPRISES?

2. Is SORBOTURF ENTERPRISES entitled to compensatory damages against BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY,

INC., SORBOTHANE, INC. (aka SORBO, INC.), and/or KENNETH M. LEIGHTON by reason of the alleged conversion of its property?

3. Is SORBOTURF ENTERPRISES entitled to punitive damages against BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC., SORBOTHANE, INC. (aka SORBO, INC.), and/or KENNETH M. LEIGHTON by reason of the alleged conversion of its property?

G. *Interference With Prospective Advantage.*

1. Did any defendant intentionally interfere with the prospective business advantage of SORBOTURF ENTERPRISES?

2. Did any defendant negligently interfere with the prospective business advantage of SORBOTURF ENTERPRISES?

3. Is SORBOTURF ENTERPRISES entitled to compensatory damages from the defendants by reason of their alleged interference with the prospective business advantage of SORBOTURF ENTERPRISES?

4. Is SORBOTURF ENTERPRISES entitled to punitive damages against the defendants by reason of their alleged interference with the prospective business advantage of SORBOTURF ENTERPRISES?

H. *Bad Faith Denial of the Existence of a Contract.*

1. If the defendants breached the alleged oral contract, did the defendants attempt to shield themselves from liability by denying, in bad faith and without probable cause, that the alleged oral contract existed?

2. Is SORBOTURF ENTERPRISES entitled to compensatory damages from the defendants by reason of their alleged bad faith denial of the existence of the alleged oral contract?

3. Is SORBOTURF ENTERPRISES entitled to punitive damages from the defendants by reason of their alleged bad faith denial of the existence of the alleged oral contract?

I. *The Claims Under the Unfair Business Practices Act, Cal. Bus. & Prof. Code §17200 et seq.*

1. Did the defendants violate section 17200 of the California Business and Professions Code by engaging in unlawful, unfair or fraudulent business practices?

2. Is SORBOTURF ENTERPRISES entitled to recover from the defendants the money or property acquired by the defendants as a result of their alleged violation of section 17200 of the California Business and Professions Code?

J. *Vicarious Liability Issues.*

1. Did HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) function as the alter ego or agent of BTR, INC.?

K. *Compensatory Damages Issues.*

1. Is SORBOTURF ENTERPRISES entitled to recover the loss of the value of its business by reason of the alleged acts and omissions of the defendants?

2. Did SORBOTURF ENTERPRISES meet its duty to mitigate its damages caused by the alleged acts and omissions of the defendants?

3. Did the alleged damages of SORBOTURF ENTERPRISES arise naturally from the alleged breach of the alleged oral contract?

4. Were SORBOTURF ENTERPRISES' alleged damages in the reasonable contemplation of the defendants at the time of the alleged breach of the oral contract?

5. To the extent that SORBOTURF ENTERPRISES' alleged damages by reason of the alleged breach of the oral contract arose from special circumstances, did the defendants have knowledge of the special circumstances at the time of the alleged breach?

6. To the extent that the defendants did not engage in wanton or willful conduct, were SORBOTURF ENTERPRISES' alleged damages by reason of the defendants' alleged tortious conduct foreseeable?

7. Are SORBOTURF ENTERPRISES' alleged damages uncertain, contingent or speculative?

8. Are SORBOTURF ENTERPRISES' alleged damages based on the mere conjectural probability of future loss?

9. Has SORBOTURF ENTERPRISES shown its alleged damages with reasonable certainty?

10. Has the conduct of the defendants prevented SORBOTURF ENTERPRISES from proving its damages with reasonable certainty?

11. Has SORBOTURF ENTERPRISES applied a proper valuation method to determine its alleged damages?

L. *Punitive Damages Issues.*

1. Is SORBOTURF ENTERPRISES entitled to punitive damages from the defendants by reason of their alleged tortious acts and omissions?

2. Are BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC., and/or SORBOTHANE, INC. (aka SORBO, INC.) liable for punitive damages by reason of the acts of their agents?

3. Is the assessment of punitive damages in contravention of the Eighth Amendment of United States Constitution prohibition against excessive fines?

M. *Personal Jursidiction Issues.*

1. Is BTR, INC. subject to the personal jurisdiction of this Court?

2. Did HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) function as the agent or alter ego of BTR, INC. for purposes of establishing personal jurisdiction?

N. *Estoppel Issues.*

1. Is SORBOTURF ENTERPRISES estopped from asserting its claims against the defendants?

X

The following admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

XI

This case to be tried by a jury.

XII

Time estimated for trial is six to eight weeks.

DATED: April _____, 1988

HON. WILLIAM B. ENRIGHT
United States District Judge

APPROVED AS TO FORM AND CONTENT:

JAMES F. STIVEN
JEFFREY M. SHOHET
ROBERT A. MCGREGOR

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By: /s/ JOHN A. TARANTINO
Attorneys for Defendants Sorbothane, Inc., BTR, Inc., Hamilton-Kent Manufacturing Company, and Kenneth M. Leighton

Of Counsel:
ADLER, POLLOCK & SHEEHAN

(Declaration of service omitted in printing)

TRANSCRIPT OF PROCEEDINGS

(Trial Commenced May 3, 1988)

[133] OPENING STATEMENT—MAC ADAMS FOR DEFENDANTS

Perhaps worst of all the evidence will show her breach of faith with Mr. Kenneth M. Leighton. The evidence will show that she actively sought to mislead him about her actions shortly before he decided, on August 1, 1983, that he would no longer do business with her. The evidence will show that she tried to deceive him about her involvement with Maurice Hiles, Sorbothane's consultant, and John Burns, Sorbothane's medical product distributor, in the development of a product for Goodyear.

Ladies and gentlemen, I am going to ask you, as you hear the evidence in this case, to consider what you see and hear through the eyes of Kenneth M. Leighton; and when you do, ask yourself what you would have done—

MR. SHOHET: Objection, argument.

THE COURT: No, he may conclude.

Go ahead.

Mr. Mac Adams: —what you would have done if you had been in his shoes.

There is another aspect to this case, which is a curious one. Mrs. McQuillan is also claiming that she developed a horseshoe pad for Sorbothane and that she is entitled to be paid. The evidence will show to the contrary. In fact, a respected equine veterinarian, Kent Vasko, who will testify in this court, developed equestrian products for Sorbothane.

* * *

[280] SHIRLEY MCQUILLAN—DIRECT

***

THE COURT: Any objection?
MR. BOMSTER: No objection.
MR. VAIL: No objection.
THE COURT: It may be received as marked.
(Plaintiffs' Exhibit No. 232 received in evidence.)

BY MR. STIVEN:

Q. When was the meeting to take place, Mrs. McQuillan? A. At four o'clock on February 10.

Q. Can you indicate what some of the items were that were to be covered on the agenda? A. Sales, sales forecasts, exchange of ideas on how each of the distributorships are being set up, some words of advice about accounts receivable, pricing, new products, the NSGA show schedule, what our duties would be, and distributor reports or customer lists.

Q. Who attended that meeting in February of 1982? A. Laurene Heinsohn, myself, all five of the distributors.

Q. Who were the five distributors at this time? A. RHR, my father, my mother came with him, Kenneth Leighton, Jr. and his partner were there, Mike Silvestro—

Q. What was the name of their business? A. I think it was still Ohio Cushions at that point—Marty Vogel, who was Triad Research, and his partner, whose name I can't remember. Arnie Lund was there from Absorbotech. ***

* * *

[295] *** I will deny your motion. I will permit them to go forward, and the evidence will come in as to all defendants, subject to a motion to strike.

Okay, gentlemen. I appreciate your comments. Thank you.

(Open court):

THE COURT: All right, sir, you may inquire.

MR. STIVEN: Thank you, your Honor.

Q. Mrs. McQuillan, let me bring you back to the point in time in reference to where we were. We were at the February, 1982, meeting of distributors in Chicago, and my question, please, is: What did Ms. Heinsohn, the marketing manager of Hamilton Kent, tell you regarding the pricing policies and requirements of Hamilton Kent regarding the distribution of Sorbothane products? A. Laurene Heinsohn told all of us that, in order to retain our distributorships, that we all had to sell the product at the same price and not undercut the price that they established and that only Hamilton Kent could establish the prices that we were to resell our products at.

She also told us that we were to police the retailers in our territory and be sure that they were not undercutting the price and that they were all charging the—what was called a suggested retail price; that that was the price that we were to enforce; and, if we found a retailer who was dropping below that or discounting the product, that we were to warn [296] them and then not service them; we weren't to sell them products any more.

We were also told that we weren't to sell to any stores that were discount stores, that would discount the product.

Q. Focusing on the particular element of what Ms. Heinsohn told you regarding the price at which you, as a distributor, would have to resell the products that were sold to you by Hamilton Kent, did she tell you there would be a specific price? A. Yes, she did.

Q. And what did she tell you about that price, in terms of whether you had any discretion to go below that? A. The only discretion that we had was that, for those of us who were on the West Coast, we could add shipping our shipping costs, to the price, if we so desired, but that we could not undercut that, couldn't go below the price that was recommended.

Q. Now, you use the term "recommended." In regard to the products which you bought from Hamilton Kent and which you were going to resell, did they give you a specific price? A. Yes, they did.

Q. And you were not to sell under that price?

MR. BOMSTER: Objection.

THE COURT: Sustained. Let her testify, Mr. Stiven. That's the way to do it. Ask the questions; let the witness [297] answer. Don't lead.

Ask your next one.

BY MR. STIVEN:

Q. In February of 1982, what was the price that was specified by Hamilton Kent for resale of Sorbothane insoles?

MR. MAC ADAMS: Objection.

THE COURT: Overruled.

If you understand it, you can answer it.

THE WITNESS: I believe that it was—I can't remember the exact amount at that point.

BY MR. STIVEN:

Q. Now, with regard to what Ms. Heinsohn told you regarding the pricing policy as it related to your resale of products to your customers, did you express to her a willingness to agree to that policy?

MR. BOMSTER: Objection.
THE COURT: Read the question back, please.
(Last question read by the reporter.)
I will note your objection and overrule it.
If you understand it, you can answer it, ma'am.
THE WITNESS: Yes, I do.
THE COURT: What did you say?
THE WITNESS: Yes, I agreed that we would go along with that pricing policy.

[298] BY MR. STIVEN:

Q. Did you at any time subsequent to that meeting discuss with Ms. Heinsohn or Mr. Leighton any possibility of deviating from that policy? A. Yes, I did.

Q. Give me the context and time of such a discussion. A. When Mr. Leighton, Sr., and Laurene came to Sorboturf in December of 1981, we discussed with them a particular account called Big Five, who is a discount sporting goods store, and they would buy in large quantities, but only if they could get a big break on the price; and we were told that we were absolutely not to give them a break on price and also that Mr. Leighton, Sr., said that he didn't want his product in the discount stores, he was afraid it would hurt its image, and that we were not to sell to them.

MR. MAC ADAMS: Move to strike. I don't think that was responsive in terms of point in time to which the question was put.

THE COURT: I will note your objection and overrule it. You may inquire in this area on cross.

MR. MAC ADAMS: Thank you, your Honor.

BY MR. STIVEN:

Q. Did you agree to that policy restriction? A. Yes, we did.

Q. Now, as I recall your testimony, there was a second [299] element to the pricing policy that was described by Ms. Heinsohn at the February meeting, and that was that, in addition to setting the price at which you could resell your products, you also had an obligation with respect to what the retailers were doing? A. Yes, we did.

Q. What was that? Can you repeat it, please? A. It was our job to police our own territories, to be sure that none of the retailers were discounting the product.

Q. And did Ms. Heinsohn indicate to you what you were supposed to do to police the territories? A. Yes.

Q. What did she tell you in that regard? A. She told us that, if we found one of our retailers discounting the product—they were all to be told they were to sell it at the same price, and, if they insisted on discounting, we were to no longer service that account and provide them with product.

Q. Did you verbally agree with Ms. Heinsohn that you would abide by that policy? A. Yes, we did.

Q. Did you, in actual practice, in the conduct of your distributorship, follow that policy?

Mr. MAC ADAMS: Objection; leading.

THE COURT: No. He is asking here one way or the [300] other. I will note your objection and overrule it. Did you follow it?

THE WITNESS: No, we did not enforce it.

BY MR. STIVEN:

Q. As to the retailers? A. No, we did not.

Q. Did you, in the conduct of your distributorship, actually follow the Hamilton Kent policy about not

reselling your product to retailers below their stated price? A. Yes, we did.

Q. Now, other than what Ms. Heinsohn told you about this policy in February of 1982, had you had any prior conversations with Mr. Kenneth M. Leighton, Sr., regarding the pricing policies of Hamilton Kent? A. Prior to?

Q. Prior to the February meeting. A. Yes. The meeting that I mentioned in December of 1981, when we discussed Big Five with him, and at that time, also, we talked about offering—in fact, I think I sent to them a copy of a proposal. We were going to have a small local show, special, where we offered a discount if they bought a quantity of product. We were told we couldn't discount it; they had to pay full price for it.

Q. Did Mr. Leighton tell you anything about who would have the final say on the price at which you would resell your [301] product to retailers? A. Yes. He said that only Hamilton Kent could determine pricing.

Q. Now, you indicated that Mr. Leighton had told you in the meeting in December, 1981, that you were not to sell to discounters. Was there a time when Mr. Leighton also told you that there were certain kinds of stores that you should not sell to? A. Yes. He told us that he didn't want the product in a discount—in discount drug stores, essentially not in drug stores at all, and not in any discount sporting goods or other kinds of discount stores.

Q. If you can refer in the exhibit book, Mrs. McQuillan, to an exhibit that's one or two pages over, an exhibit that's been marked 1188, a letter of March 1. A. Of '83?

Q. Yes. Can you identify that letter? A. Yes, I can. It's a letter from Sorbo Incorporated, from Mr. Leighton, to me.

Q. And the date? A. March 1, 1983.

Q. Now, this is 1983. By this time Hamilton Kent has become Sorbo Incorporated; is that correct? A. That is correct.

Q. At least, as it relates to the manufacture of Sorbothane [302] products? A. Yes.

MR. STIVEN: I would offer Exhibit 1188, your Honor.

MR. BOMSTER: No objection.

THE COURT: All right. It may be received as marked.

(Plaintiffs' Exhibit No. 1188 received in evidence.)

BY MR. STIVEN:

Q. What did Mr. Leighton tell you in March of 1983 about selling to drug stores? A. Should I read it?

Q. Yes. Read the pertinent portions. A. "Drug stores is a slight problem, but resolved as follows:

"If the town is not close to a city and town has no athletic retail store, then I have no objection, unless it is classified as a discount drug store. (Then I have a problem.) However, we should avoid drug stores as a retail outlet as much as possible."

Q. How did this particular controversy arise, if you recall? A. Sorbo, Inc., had introduced a new distributor, Intermark, and told them that they had the box shoe trade, and they were out in the marketplace selling anywhere their sales reps went.

Q. Including in your territory? A. Definitely. They had a nationwide distributorship that was granted to them in the summer of 1982. And Mr. Leighton, [303] after he had a number of complaints from all of us, he had sent us all a letter trying to define stores and who could sell where; and we had written back and made

other objections, and this was a letter in response to some of those objections.

Q. Where he was trying to clarify whether you could or couldn't sell to drug stores; is that correct? A. Yes.

Q. With regard to the requirement that was imposed on you that you were supposed to police your retailers to make sure that they were abiding by the prices set by Hamilton Kent, did you receive a letter from Ms. Heinsohn that addressed that subject? A. Yes.

Q. Will you refer back to the document marked as Exhibit 10. It doesn't have a date on the first page, but it shows a date of October, 1982, on the second page. Do you find that? A. Yes, sir.

Q. Who was the author of this letter? A. Laurene Heinsohn.

Q. And it was mailed to you at Sorboturf Enterprises? A. Yes, it was.

MR. STIVEN: I would like to offer Exhibit 10, your Honor.

THE COURT: Any objection?

MR. BOMSTER: No objection, your Honor.

* * *

[327] felt over time to the showing of "That's Incredible" piece on Sorbothane products in March of 1982?

MR. MAC ADAMS: Objection, your Honor.

THE COURT: Overruled. I will note your objection and overrule it.

You can tell us, Ma'am.

THE WITNESS: The general response of the general public?

MR. STIVEN: Yes.

THE COURT: That you know.

MR. STIVEN: Yes, to your knowledge.

THE WITNESS: From the response that we got, to us, people were excited that there was something that could help stop pain—a lot of it for themselves and a lot of it because they had a youngster in high school or college that could no longer compete in sports and was probably driving his mother crazy by staying at home. Husbands who had wives who could now shop eight hours a day because their feet didn't hurt instead of two or three; excitement because a lot of people—because they have foot pain—could relate to a product that could help with that kind of pain. They were all fascinated because it was so unusual and so unique—and to see the football player beating on Maurice's hand and all was a dramatic and exciting thing for people.

Q. Did the showing of "That's Incredible" in fact, over a [328] period of time, produce a significant growth in your business? A. Yes, it did.

MR. MAC ADAMS: Objection.

THE COURT: Yes, it did. Overrule the objection. The answer may stand.

A. Yes, it did.

Q. When the show was actually aired in mid-March, 1982, on—was it the 15th or 16th, if you recall or do you recall? A. I think it was the first part of March. I don't remember the exact date.

Q. Did you anticipate that you would have a huge influx of telephone inquiries on the day following the airing of the show? A. Oh, yes. We had been prepared and prepped by Laurene Heinsohn about what the potential response would be; and we had extra staff and extra phones and had prepared a flyer and sent it back

to be mailed out because of the influx that we did expect both by phone and by letter.

Q. You mentioned the flyer. Looking in your exhibit book, do find an exhibit marked Exhibit EEQ? A. Yes.

Q. What is that exhibit, Shirley? A. That's the cover letter that we produced, that just says, "Dear Sorbothane Inquirer," and some general information about Sorbothane; and I believe there is an order form that is not on ***

* * *

[407] so the boots will be made ready before the airing.

"Mr. Leighton, it will still be a week or two before a final agreement will be reached between Ohio Cushions and Sorboturf. We don't have time to slow down on Equestrian and hope this time is satisfactory to you and Sorbo.

"Please drop me a line if you have any suggestions concerning the equestrian products or our negotiation with Ohio Cushions. Sincerely, Shirley Mc Cone."

THE COURT: Is that the letter you sent, Ma'am?

THE WITNESS: Yes, it is.

Q. (By Mr. Stiven): Did Junior respond to your letter to him wherein you sent the—your letter of July, wherein you sent to him financial information concerning your business? A. Yes, he did.

Q. Did he respond in writing or by telephone? A. Telephone.

Q. When, approximately, did he call you? A. I think—approximately the second or third week of July.

Q. Can you tell the jury what Mr. Kenneth B. Leighton, Jr., told you in that telephone conference? A.

He told me that he would make one offer and one offer only; and it was for four thousand dollars a month for twelve months and he said that should be enough so that I can sit home and eat chocolates and watch soap operas.

Q. How did you feel about Mr. Kenneth B. Leighton, Jr.'s offer [408] to you?

MR. MAC ADAMS: Objection, your Honor.

MR. VAIL: Objection, your Honor.

THE COURT: Overruled. You can answer that.

THE WITNESS: I was insulted. That was not even as much as the business was making or as much as he would have to pay a sales rep in that area.

Q. Did Mr. Leighton, Kenneth B. Leighton, Jr., say anything further to you about what would happen if you did not accept his offer? A. That we would end up without any business at all anyway, that he was going to be the national distributor and have a market; so I had that offer or nothing.

Q. Were you able to respond to him in the telephone conference? A. No, I couldn't even talk at that point.

Q. Did you subsequently write him a letter? A. Yes, I did.

Q. Do you have Exhibit 667 in your book? A. Yes, I do.

Q. Can you identify that? A. That's the letter I wrote in response to his offer.

MR. STIVEN: Offer Exhibit 667 into evidence, your Honor.

* * *

[506] happened, and asked him if there was any possibility of having the Sorbothane insoles from one of the British manufacturers or another manufacturer, so that we could continue to service our customers.

Q. What did Dr. Hiles tell you in that regard? A. He told me that that wouldn't be possible because the companies that—the only manufacturer of Sorbothane in the U.S. was Sorbo, Inc., and that the other companies outside of the U.S. weren't allowed to sell into the United States.

Q. So, with your inability to obtain Sorbothane products, was that the end of your Sorboturf Enterprises distributorship? A. Yes, that was the end of it.

MR. STIVEN: No further questions, your Honor.

THE COURT: All right. Thank you, Ma'am. You may step down.

Ladies and Gentlemen, this might seem to be an appropriate time to take our afternoon recess.

Let me bring you up to date, too, Ladies and Gentlemen, on scheduling, at least for the balance of the month, as I envision it now.

Thank you, Ma'am. You may step down.

As you know, we'll not be in session tomorrow, Friday. The next two weeks—counsel should make note of this, also. We will commence our sessions on Tuesday, but we will not be in session on the Wednesday of each of the next two weeks. ***

* * *

[600] MC QUILLAN—CROSS BY MAC ADAMS

*** A. Yes.

Q. You would have to pay within 30 days? A. Yes.

Q. In that interim, you would be legally obligated to pay Hamilton Kent for the product on which you took delivery? A. Yes, I would.

Q. That was an extension of credit to you, correct? A. Yes.

Q. Now, in June of 1982, that's the first time you say a credit limit was imposed upon you; is that right? A. Yes.

Q. That was in the amount of Five Thousand Dollars? A. Yes, it was.

Q. And later the credit limit was increased to Ten Thousand Dollars, correct? A. Yes, it was.

MR. MAC ADAMS: One moment, please, your Honor.

(Pause.)

BY MR. MAC ADAMS:

Q. Mrs. Mc Quillan, let me show you what has been marked as Defendants' Exhibit F.I., a letter dated July 9, 1982, on the letterhead of Sorbo, Incorporated, to you, and ask you if you can identify that. A. Yes. That's the letter I got on July 9, ***

* * *

[605] Twenty Thousand to Forty Thousand during this problem period to see you over the hump; isn't that true? A. That's what I said, yes.

Q. So your credit limit went up to Twenty Thousand in December of '83, and then, in May of '83, when you had this problem, it went up to Forty Thousand; isn't that true? A. Yes.

Q. Now, in—strike that question. May I see Exhibit 489, please?

Mrs. Mc Quillan, do you contend that the quotas that were given to Sorboturf Enterprises were unreasonably high for purposes of pressuring you? A. We thought that at the time, but we did meet them.

Q. In fact, the first quota you were given was in February of 1982, correct? A. Yes.

Q. And you complained at this time about the quota that you had been given, didn't you? A. Yes, I did.

Q. But you were able to meet it? A. Yes.

Q. But it ultimately proved that your complaints were unfounded; is that correct? A. Yes, it did.

Q. Laurene Heinsohn, who had developed it for him, was then a [606] better judge of what the sales would be than you were, correct? A. Yes, she was.

Q. Now, you were given a second quota in November of 1982; but, because of your termination on August 1 of '83, that full year didn't get completed, correct? A. Yes, correct.

Q. You don't maintain that Hamilton Kent or Sorbo, Inc., gave you quotas for the purpose of oppressing you and pressuring you, do you? A. No.

Q. But you originally contended that in this lawsuit, didn't you? A. Yes.

Q. When you filed it in July of 1984— A. Yes.

Q. —that was one of the things that you accused this gentleman of doing to oppress you, isn't it? A. Yes.

Q. And you are now recanting this accusation? A. That the specific numbers—we met them, so they weren't unrealistic.

Q. In fact, in April or May of 1982, Mr. Leighton had told you—meaning Kenneth M. Leighton—had told you not to worry about the quota, that it was only one criteria; isn't that true?

* * *

[661] THE COURT: Good afternoon again, Ladies and Gentlemen.

The Court would find all members of the jury panel present, together with counsel.

The witness has resumed the stand.

You may inquire, sir.

MR. MAC ADAMS: Thank you, your Honor.

BY MR. MAC ADAMS:

Q. Mrs. Mc Quillan, I would like to place before you what has been admitted into evidence—received into evidence as a full exhibit. It's Exhibit I.T., an undated letter, typewritten letter, bearing your signature, to Mr. Leighton. A. Okay.

Q. Now, Mrs. Mc Quillan, my recollection of your testimony on direct examination, in response to a question from Mr. Stiven, is that you sent this letter about a month after you had received a June 14, 1983, letter from Kenneth M. Leighton concerning Goodyear Wingfoot. Do you recall that testimony? A. Approximately that time, yes.

Q. I would call your attention to that part of Exhibit I.T., "I will be sending"—

It reads, quote (reading):

"I will be sending the soft insoles back to you this week. We recalled everything that went out from

* * *

[670] *** or show the sales of each one of those items separately, did you? A. No, I didn't.

Q. Now the "returns," which is here in parentheses, 1191, represents returned merchandise totaling One Thousand One Hundred Ninety-One Dollars, correct? A. Yes.

Q. That would be returned for one reason or another, correct? A. Correct.

Q. All right. And, the cost of sales—now, we cut it off—I am sorry—is—let's see.

Cost of sales, right here, this line, will move in. Right there, shows that you had cost of sales which, when calculated, in the right hand column, show a Hundred and Sixty-Eight Thousand Four Hundred Sixty-Three Dollars as the cost of sales, right?

(Pause.) A. Before I answer that, these were the numbers given to the accountant. I think that is what it does. I am not very good at reading the profit and loss. I may not know exactly what that represents, but I assume that that's what it represents.

Q. These are Sorboturf Enterprises' financial statements? A. Yes, they are.

* * *

[706] Q. You became the exclusive distributor for the Goodyear pad in the spring of 1983; is that correct? A. Yes.

Q. Now, your exclusive distributorship for the—that horseshoe pad, the Goodyear horseshoe pad, was throughout the entire 50 United States; is that correct? A. Yes.

Q. Incidentally, Mrs. Mc Quillan, the agreement which you had with Goodyear was not in writing, was it? A. No, just oral.

Q. Now, the pad which you offered for sale with the Goodyear material was first offered for sale in June of 1983; is that correct?

MR. STIVEN: I am sorry, your Honor. Can we clarify: sale to whom?

MR. MAC ADAMS: To the public.

THE COURT: If you understand it, you can answer it.

THE WITNESS: I don't remember the exact date. Somewhere in that time frame.

BY MR. MAC ADAMS:

Q. Well, without regard to the exact date, do you recall it being offered in June of 1983? A. I don't remember when we first offered it for sale.

Q. Mrs. Mc Quillan, I would like to call your attention to the deposition of July 15, 1986, page 109, line 5 (reading):

[707] "Q. Now, when is the first time that a pad which originated from Goodyear was ever offered for sale to the public?

"A. I believe in June of '83."

That was your testimony on July 15 of 1986, correct? A. Yes.

Q. Now, the Goodyear pad with the Wingfoot XL material, you had initially begun to purchase that from a company called Pegasus; is that correct? A. Yes.

Q. There came a point in time when you then would purchase it directly from Goodyear; is that correct? A. Yes.

Q. Pegasus was a company which had been formed by Maurice Hiles, Sorbothane's consultant, and John Burne, its medical distributor, to acquire the Goodyear material, to in turn sell to you; is that correct? A. Yes.

Q. Now, from the Spring of 1983 until June of 1983, you were devoting approximately 20 hours a week to the Goodyear horseshoe pad activity; is that correct? A. That would vary according to what the testing program was. Sometimes not nearly that much. That might—you know, I don't know specifically the amount of time.

* * *

[709] Q. That's just a typo. It should be Unicornio? A. Yes.

MR. MAC ADAMS: I would move the introduction of Exhibit K.W..

THE COURT: It may be received.

(Defendants' Exhibit K.W. received in evidence.)

MR. MAC ADAMS: I would like to publish it to the jury.

BY MR. MAC ADAMS:

Q. Mrs. Mc Quillan, the top of this, unfortunately, is cropped a bit, but it's the Goodyear Tire and Rubber Company, dated May 3, 1983, and it's addressed to Pegasus, at your address, meaning the address for Sorboturf Enterprises, correct? A. This is where they shipped the pads to.

Q. It reflects an order of 1,980 pair of Wingfoot XL horseshoe pads for the total cost of Five Thousand One Hundred and Sixty Dollars; and then there is a cost reflected on this bill that is in this area of Ten Thousand Two Hundred and Sixteen Dollars and Eighty Cents, correct? A. Yes.

Q. Up here, it calls for a shipment of 500 pair per week, a.s.a.p., meaning "as soon as possible"; is that correct? A. Yes.

Q. Now, Mrs. Mc Quillan, you are acquainted with a company that was known by the name Equistep, are you not? [710] A. Yes, I am.

Q. That company was formed in early 1983; is that correct? A. Yes.

Q. That company, Equistep, is not a corporation, is it? A. No, it's not.

Q. The two principals, meaning the two owners of Equistep, were you and your husband, Larry Mc Quillan, correct? A. Correct.

Q. Equistep, at the time it was formed, was located where Sorboturf Enterprises was located; isn't that correct? A. The storage was there. We had a separate address.

Q. A separate mailbox address? A. Yes.

Q. The address for the location of Equistep was at the same location as Sorboturf? A. Yes. That was the shipping area.

Q. Equistep was formed by you in early '83 for the purpose of selling the Wingfoot XL horseshoe pad; isn't that correct? A. Yes.

Q. Equistep was full time for you and Mr. Mc Quillan; isn't that correct? A. No.

Q. Are you sure of that? A. It wasn't something that took full time at this point, no.

* * *

[713] Q. That's the reason why you didn't respond? A. Part of the reason, yes.

Q. Then there was a letter written to you, Exhibit 64.3, which is dated June 14, 1983; on the letterhead of Sorbo, Incorporated, addressed to you, to your attention, which reads, quote, "Shirley, enclosed is a copy of the letter I sent to you June 3, 1983. I would appreciate it if you would inform me of your position in regard to the situation mentioned in my letter," signed Sorbo, Inc., K.M. Leighton, President. It enclosed a copy of his June 3 letter, didn't it? A. Yes, it did.

Q. You chose to ignore that letter, as well, didn't you? A. No. I answered that letter.

Q. Well, did you specifically answer that letter, or was there a follow-up telephone call from Mr. Leighton that you wrote in response to it? A. Yes. It was a combination of the phone call and that letter.

Q. And Mrs. Mc Quillan, let me show you what's been marked as Exhibit—Defendant's Exhibit E.E.G., and I will ask you if that's a letter written by you to Maurice Hiles sometime in the June, 1983, timeframe, and prior to your sending your letter to Mr. Leighton, which is Exhibit I.T.? A. Yes, it is.

MR. MAC ADAMS: All right. Your Honor, I would move [714] the introduction of Exhibit E.E.G.

THE COURT: Is there any objection?

MR. STIVEN: No objection, your Honor.

THE COURT: It may be received as marked.

(Defendants' Exhibit E.E.G. received in evidence.)

MR. MAC ADAMS: Your Honor, I would like to read to the jury pertinent portions of this. I don't have a transparency.

THE COURT: Yes, you may.

MR. MAC ADAMS: The letter is (reading):

"Dear Maurice, Enclosed is our marketing profile and some basic projections for the first year. I have also included the letter from Goodyear just to keep you updated on my communications with them."

Skipping down to the next-to-the-last paragraph, and continuing (reading):

"I have not yet responded to Mr. Leighton. I suppose I'll simply tell him that the Equistep people asked me to use the pads on my horses and act as a consultant for them. He really can't object to that as he wasn't interested in using me.

"I will get this right in the mail. Hope your trip to Reno wasn't too muddy. Love and Sunshine, Shirley.

"P.S., this letter will self-destruct in three [715] minutes."

BY MR. MAC ADAMS:

Q. That's what you wrote to Maurice Hiles, isn't it? A. Yes, I did.

Q. Now, Mrs. Mc Quillan, there did come a time when you sent the letter to Mr. Leighton, which is Exhibit I.T., correct? A. Yes.

Q. And putting up on the projector, this is the letter that you sent to Mr. Leighton; is that correct? A. Yes, it is.

Q. During your direct examination, Mr. Stiven asked you some questions concerning the truthfulness of some of the statements contained therein, and I would like to go over some of that with you. A. Okay.

Q. Mrs. Mc Quillan, the first sentence: "There is a California company playing with Wingfoot as a horseshoe pad." Stopping there.

The California company to which you refer in that sentence is Equistep, isn't it? A. Yes, it is.

Q. The principals of Equistep were you and Mr. Mc Quillan, correct? A. That is correct.

Q. Now, you didn't tell Mr. Leighton, in this letter, that the [716] company that was, quote, "playing with Wingfoot as a horseshoe pad," was in fact your company, did you? A. No, I did not.

Q. You go on and then say, "I do so much in the way of clinics and chiropractic work in the area, they have asked me to act as consultant to their R. and D. Department," close quote, and stopping there. Now, who of the "they" asked you to do that? Did you ask yourself? A. No. Maurice Hiles and John Burne had asked me.

Q. You are referring in this first paragraph to the California company, are you not? A. I was referring to the people that were involved with Wingfoot, not specifically with the company.

Q. You told them that you were involved with the California company, and they asked you to get involved; is that right? A. Yes, that is right.

Q. You didn't disclose to Mr. Leighton who the "they" are, did you? A. Certainly not.

Q. Now, at the time you wrote this letter to Mr. Leighton, you didn't want him to know the full extent of the truth concerning your involvement with Goodyear, did you? A. I was afraid to let him know the truth.

Q. But you didn't want him to know the truth, did you?

* * *

[721] ***

Q. And you never disclosed with Mr. Kenneth M. Leighton that you were approached by Sorbothane's consultant and John Burne, and that's who you were involved with, did you? A. They asked me not to.

Q. You agreed to that? A. Yes, I did.

Q. In fact, you even wrote to Mr. Hiles and told him, "Well, I will just tell Mr. Leighton that this company, Equistep, approached me to act as a consultant"; isn't that right? A. Yes, I did.

Q. Now, the next paragraph, the first sentence, which says (reading): "I will be happy to keep you informed"—right here—"I will be happy to keep you informed about anything that develops with the Wingfoot research."

At the time you wrote that letter and made that statement to Mr. Leighton, you did not then intend to do just that, did you? A. No, I did not.

Q. And it was your hope, was it not, that Mr. Kenneth M. Leighton would rely upon this letter; isn't that true? A. I hoped it would keep him from trying to

use this as an excuse to take away my insole distributorship the way he had been trying to do the whole past summer.

[722] Q. In fact, Mrs. Mc Quillan, it was your hope that he would rely upon what you said in this letter; isn't that true? A. That he would believe me?

Q. That he would rely upon it. A. Yes, I hoped that he would believe me when I wrote that.

Q. And rely upon it? A. I am not sure what you mean by "rely upon it."

Q. Take it as true. A. Yes.

MR. MAC ADAMS: One moment, please, your Honor.

(Pause.)

THE COURT: This exhibit now on the board is what, sir?

MR. MAC ADAMS: I.T., your Honor.

THE COURT: Thank you.

MR. MAC ADAMS: Your Honor, I have nothing further of the witness.

THE COURT: All right. You may inquire, sir.

MR. STIVEN: Is Mr. Vail going to conduct cross-examination, your Honor?

THE COURT: I am sorry. Mr. Vail, you may inquire.

CROSS-EXAMINATION

BY MR. VAIL:

Q. Good morning, Mrs. Mc Quillan.

* * *

[824] LAURENE HEINSOHN—DIRECT BY SHOHET

Did you have discussions with any of the distributors concerning at what price, if any, they would be permitted to resell Sorbothane products? A. Yes.

MR. BOMSTER: If it please the Court, may I have a timeframe on this, please?

THE COURT: I assume he will.

BY MR. SHOHET:

Q. Did you have discussions with them shortly after the discussions that you identified where you said, "Go ahead and begin marketing"? A. Yes.

Q. So that would be in the fall to winter, 1981? A. Yes.

Q. What did you tell them with regard to the resale price of Sorbothane by the distributors? A. To maintain the resale price.

THE COURT: What was that to be, 50 percent markup, Ma'am?

THE WITNESS: Yes.

BY MR. SHOHET:

Q. And did you have discussions with Kenneth M. Leighton concerning your direction to the distributors to hold the resale price at a 50 percent markup? A. Yes.

[825] Q. And did Kenneth M. Leighton give you any particular direction with regard to that subject? Did he tell you to go ahead and tell the distributors to do that?

MR. BOMSTER: Objection.

THE COURT: No. I will note your objection and overrule it.

You can answer it now.

THE WITNESS: Yes. Mr. Leighton, Sr., told me to manage the distributors to maintain that wholesale price.

Q. Did Mr. Leighton, during the entire course of your employment at Hamilton Kent or Sorbothane, Inc., ever tell you to contact a distributor because there was discounting going on in that distributor's territory? A. Yes.

Q. On how many occasions do you recall Kenneth M. Leighton telling you to contact a distributor as a result of discounting? A. One specific time that I remember.

Q. What were the circumstances of that specific instance? Do you remember the time? A. Yes. In November of 1981, Marty Vogel was selling below what we had—below what we had recommended as the wholesale price.

Q. How did you learn that he was doing that? A. Ken Leighton, Jr., discovered it and notified myself and [826] Ken Leighton, Sr.

Q. Did you discuss that with Ken Leighton, Sr.? A. Yes.

Q. What did you discuss? What did he say and what did you say? A. His request to me was to call Marty and to ask Marty to maintain the price that we had asked him to maintain.

Q. Did you do so? A. Yes.

Q. Did Mr. Vogel tell you—what did Mr. Vogel say to you with regard to your request that he hold the price? A. Mr. Vogel responded positively.

Q. Did you have discussions with other distributors regarding their holding the resale price? A. Yes.

Q. Did the other distributors—did Mr. Vogel and the other distributors agree to hold the resale price of Sorbothane in their territory?

MR. BOMSTER: Objection

MR. MAC ADAMS: Foundation, your Honor.

THE COURT: I think we are getting into some other areas. It smacks of hearsay, sir. I don't know what other purpose it would have.

MR. SHOHET: Simply to establish an agreement; and it's really verbal conduct.

[827] THE COURT: How are you going to do that? Are you going to do each individual distributor?

MR. SHOHET: I can do that.

BY MR. SHOHET:

Q. Ms. Heinsohn, did any of the distributors express a willingness or agreement to hold the resale price of Sorbothane?

MR. BOMSTER: Objection, no foundation.

THE COURT: Lay a further foundation.

BY MR. SHOHET:

Q. First, if you would say what occurred, and then I would like to know when and what circumstances. A. Yes, it did occur.

Q. With which distributors did you reach an agreement on their part to hold the resale price?

MR. MAC ADAMS: Objection.

MR. VAIL: Objection.

THE COURT: I will note your objection.

Was there any dissent from that, Ma'am, on holding the price by any distributors?

THE WITNESS: Yes.

THE COURT: Okay. You may inquire.

BY MR. SHOHET:

Q. Which of the distributors disagreed or were unwilling? Which, if any, were unwilling to hold the price? A. R.H.R. and Sorboturf.

[828] Q. Did Marty Vogel express a willingness to hold the resale price? A. Yes.

Q. Did Kenneth B. Leighton? A. Yes.

Q. Did Arnie Lund express a willingness to do so? A. Yes.

Q. Did you ever discuss with any of the distributors whether, if they failed to hold the resale price of Sorbothane, their right to continue to act as a distributor would be affected? A. Yes.

Q. With whom did you have those discussions? A. Specifically with Marty Vogel.

Q. What did you tell Mr. Vogel with regard to the consequences to his distributorship if he did not maintain the resale price? A. That it would reflect negatively regarding his performance approval or evaluation.

Q. Did you discuss with Kenneth M. Leighton the fact that you either had or made such a statement to Mr. Vogel? A. I was directed by Mr. Leighton to make that statement.

Q. Did you understand that the other distributors—strike the question.

To your knowledge, were the other distributors aware of the fact that, if resale prices were not maintained, their distributorship would be in jeopardy?

[829] MR. MAC ADAMS: Objection.

MR. VAIL: Objection.

THE COURT: I will overrule the objection. You can answer that.

THE WITNESS: Yes.

BY MR. SHOHET:

Q. Now, I would like to talk to you a little bit with regard to the pricing policies, if any, that related to the retail price for Sorbothane.

Did you have discussions with any of the distributors concerning their responsibilities to see that the retail price or the price sold by their customers to the public was fixed? A. Yes.

Q. With whom did you have such discussions? A. Marty Vogel.

Q. Any others? A. He's the only one I specifically remember.

Q. Do you remember when that conversation or conversations took place? A. I believe in the same timeframe, fall of 1981.

Q. Tell me what you told Mr. Vogel with regard to his responsibilities as to the retail price. A. That, if there was—there was one specific case in which a retailer was selling below recommended list in his territory; and we requested that Marty follow up on that account and find [830] out what the problem was and to rectify it.

Q. Was that a circumstance—do you remember the state in which the retailer was undercutting the retail price? A. No, I don't.

Q. If I said West Virginia, would that refresh your recollection? A. I recall that there was a problem in West Virginia. I don't recall if that one was specifically tied to Marty Vogel.

Q. The problem that you recall in West Virginia, was that also related to a retailer not selling at the, quote, "recommended," close quote, list price? A. Yes.

Q. Did you ever have a discussion with Kenneth B. Leighton where he told you what, if anything, he did, to control retail prices in his territory? A. Yes.

Q. Do you remember when—did you have more than one conversation with Kenneth B. Leighton on that subject? A. No.

Q. Do you remember when that conversation occurred? A. I believe it occurred after I started working for him, which would put it in early spring of 1983.

Q. What did he tell you with regard to what steps, if any, he took to see that his retailers held the price? A. He would slow down shipments.

[831] Q. He told you that? A. Yes.

Q. He said he slowed shipments as a means of keeping the retail prices fixed? A. Yes.

Q. Did Mr. Leighton ever tell you to contact a distributor as a result of that a retailer in that distributor's territory was undercutting the retail price? A. I am sorry, repeat the question.

Q. Did Mr. Leighton, Sr., ever tell you to contact the distributor because he had learned—"he" being Mr. Leighton, Sr.—had learned that a retailer in that distributor's territory was selling below the retail price? A. The one specific case that he told me to follow up was on the West Virginia issue.

Q. Did he tell you to contact the distributor that covered the West Virginia territory because he learned that a retailer was selling below the recommended price? A. Yes.

Q. Do you remember who the distributor was at that time that was covering the territory? A. I believe that it was Ohio Cushions at that time.

Q. Do you remember the name of the retailer that was cutting the price? A. No.

[832] Q. Do you remember the other occasions where the fact that a retailer was undercutting the suggested retail price caused Mr. Leighton to tell you to do something? A. No.

Q. All right. Now, I would like to move your attention, if I might, to a meeting at Kenneth B. Leighton's office, wherein you were present, John Burne was present, and Kenneth M. Leighton was present, approximately a week to ten days before the February Distributors' meeting. Do you have that meeting in mind? A. Yes.

Q. Just to set the context, do you remember the date or approximate date that that meeting occurred? A. Approximate date, last week in January.

Q. As of this meeting, had John Burne's appointment as the National Medical Distributor already been announced to the regional distributors? A. Yes.

Q. And there was a meeting scheduled at this time in Chicago, on February 10, between all the distributors, all the regional distributors, correct? A. Yes.

Q. And this meeting occurred where? Was it at—where did the meeting occur? A. We had the meeting, I believe, in—at the Mc Cormick Inn, [833] which is the hotel that the majority of us were staying in at this time.

Q. That's the February Chicago meeting? A. Right.

Q. All right. Now, I am going back to the meeting involving Mr. Burne, yourself, and Kenneth M. Leighton, Sr., and Kenneth B. Leighton. Where did that occur? A. That meeting took place in Ken B. Leighton's office.

Q. Again, that was about a week or ten days before the Chicago meeting? A. Yes.

Q. Did you discuss with Kenneth M. Leighton, prior to the meeting, what his purpose was? A. Yes.

Q. What was your understanding of its purpose, based on that conversation? A. The purpose for the meeting—and the meeting was primarily motivated at the request of John Burne—was to reevaluate our marketing approach; and what we mean by that is: we

had just announced a centralized national distributor for the medical market; and, on the other side, we had five regional distributors selling shoe inserts to the retail market. So there was a lot of overlap on that. John Burne felt that that was going to be a problem.

[834] Q. Did Mr. Burne express his views on that subject to you? A. Yes.

Q. Did he say why he felt that it would be a problem continuing to deal with five regional distributors? A. It would be a problem of control for him and—because the five original distributors were marketing to retail medical outlets, the same market that John Burne was going to be approaching.

Q. Was John Burne's price to his customers—strike the question. Was the price at which John Burne's customers intended to sell Sorbothane higher than the price at which the retail customers were selling Sorbothane to retail accounts or retail consumers? A. Yes.

MR. MAC ADAMS: Objection. Foundation, your Honor.

THE COURT: I will overrule the objection. The answer may stand.

BY MR. SHOHET:

Q. Was there any discussion about the price difference between the price of Sorbothane in the medical market and the price of Sorbothane in the athletic market as a factor causing the need for this meeting? A. Yes.

Q. Did you have such discussions with John Burne concerning [835] how the price differential affected the need for control of the market? A. John Burne's marketing approach was that he was selling the same

insole the other five distributors were selling, purchasing that insole for less than the other distributors were purchasing it for, and then reselling it for approximately twice as much as what the sporting goods stores were selling it for. So, in essence, what was happening was: a doctor could go down to a sporting goods store, buy a pair of insoles cheaper than getting it from John Burne.

Q. And did Mr. Burne express to you or anyone else at the meeting a desire to have a single national distributor in the sports market? A. That was John Burne's desire.

Q. Did he say why he wanted a single national distributor in the sports market? A. It would be easier for him to enter into an agreement with one person, perhaps entice that person to also raise their prices, or at least not infringe on his market.

Q. Now, was there a discussion at this meeting concerning what, if anything, to do to the other regional distributors, that is the distributors other than Kenneth B. Leighton? A. Yes.

Q. Tell me who said what on the subject of what to do about the other regional distributors? [836] A. Well, to set up the meeting, the meeting was called to discuss—by John Burne to discuss how we could realign the retail marketing on the insoles of the five distributors to a national system. That was the point of the meeting.

The next step was: how would you do this with the five distributors? The first recommendation from John Burne and Ken Leighton, Sr., was simply that we would cancel them and then name one national distributor.

Q. Was there discussion about who that national distributor would be? A. Yes.

Q. And who was—who was the national distributor to be in those discussions? A. Ken Leighton, Jr.

Q. Do you remember both Kenneth M. Leighton and John Burne suggesting that the other regional distributors simply be canceled? A. Yes.

Q. Did you say anything in response to the suggestion in or about January of 1982 concerning the cancellation of the other regional distributors? A. Yes. My concern—and I was at the meeting, also. My concern was that I felt that we had given a verbal commitment to these five distributors and had entered into a relationship with them. I did not understand how we could cancel these [837] distributors without cause; and to take that one step further, if we did cancel the distributors without cause, that there would be some legal ramifications for that.

Q. Following your comment in that regard, was a second alternative discussed concerning how to make Kenneth B. Leighton the national distributor? A. Yes.

Q. What was the second alternative? A. The second alternative was to convince R.H.R., Sorboturf, Triad, Absorbotech, the four other distributors, to recognize Ken as a national manager in that particular market, and he would manage the business for these four other distributors. They would maintain their territories, but the business decisions on how to market would be managed by Ken.

Q. Was there some discussion as to just how you would go about convincing the other regional distributors that Kenneth B. Leighton and Ohio Cushions would be the national leader of the market? A. Yes.

Q. What was discussed on that subject at the meeting? A. The reason we felt that this might be a viable alternative is that Ken did have the strongest business sense of the five distributors, or at least that

was our perspective at the time; and so we wanted to use that argument, that it may be beneficial for them to recognize that expertise and take advantage of [838] it.

Q. Did Kenneth M. Leighton, at or shortly after this meeting, give you direction to attempt to portray Kenneth B. Leighton and his company as the national leader among the distributors? A. I was told to pursue that, yes.

THE COURT: Don't lead in this area, sir. Let her testify.

MR. SHOHET: All right.

BY MR. SHOHET:

Q. Did you have such a discussion with Kenneth M. Leighton at the meeting itself? A. The meeting resolved that that was the approach we would take as opposed to canceling the distributors, and that this approach would be presented at the Chicago meeting.

Q. Following the meeting, what, if anything, did you do, in other words, to be prepared to portray Kenneth B. Leighton as a national distributor at the upcoming Chicago meeting? A. I put together a series of statistics, as far as sales, customers, number of outlets, that type of thing, as a comparison chart between each distributor.

Q. Would you take a moment now and locate Exhibit 441 in your book? Is Exhibit 441 a chart that you prepared for presentation at the February, '82, sales meeting in Chicago? A. Yes.

[839] MR. SHOHET: I would offer it into evidence, your Honor.

THE COURT: Is there any objection?

MR. BOMSTER: No objection, your Honor.

(Plaintiffs' Exhibit 441 received.)

MR. SHOHET: May I publish it to the jury?

THE COURT: Yes.

BY MR. SHOHET:

Q. First of all, did you prepare Exhibit 441 following the meeting that we have just been discussing, following the meeting at Kenneth B. Leighton's office and prior to the Chicago sales meeting? A. Yes.

Q. Was Exhibit 441 actually presented at the Chicago meeting among all the distributors? A. Yes.

Q. Are the figures for Ohio Cushions for December, 1981, correct or incorrect? A. Incorrect.

Q. Did you prepare Exhibit 441, intentionally inserting an incorrect figure in December, 1981, for Ohio Cushions' sales figures? A. Yes.

Q. In what sense is the December, 1981, figure incorrect? How is it incorrect? [840] A. The figure is inflated.

Q. By how much is it inflated, or how did you come up with that figure, if you remember? A. I took the orders placed for January and rolled them back into December.

Q. Did you include the December figures as well as the January figures? A. I added December and January together and created that as the December figure.

Q. Why did you do that? A. Because originally, in order to sell the idea to these distributors that—about Ken's expertise and the benefit of it, we tried to have a comparison graph. On that comparison graph, at that time, Ken's performance was not—was good, but not—we did not feel strong enough to be able to convince them that he was that far ahead of their own businesses.

Q. Whose idea was it to falsify the sales figure for December, 1981, for presentation at the meeting in Chicago? A. Ken Leighton, Sr.

Q. In addition to this document, do you remember a graph being created for use at the February sales meeting that depicted the various sales levels of the regional distributors? A. Yes.

Q. And did that graph also overstate Kenneth B. Leighton and Ohio Cushions' performance for December, 1981? [841] A. Yes.

Q. Did the attempt to use the sales figures as a means of persuading the other regional distributors to recognize Ohio Cushions as the national leader work? A. No.

Q. Following the—by the way, let's cover that meeting now. The meeting that we have been talking about where these figures were presented, that was a February 10, 1982, meeting in Chicago, right? A. Yes.

Q. Who paid for the expenses to attend that among the distributors? A. All of the distributors paid for their own expenses to get there, lodging. They also were asked to contribute to some of the cost of the show.

Q. In addition to presenting the sales figures that we have just been talking about, was there any further discussion at the sales meeting concerning the pricing requirements, specifically the requirement to hold the resale price? A. Yes. There was a specific discussion about maintaining consistency on the wholesale price.

Q. Do you remember any further discussion about the need to control the retail price, as well, at the meeting? A. No.

Q. Now, was John Burne also present at this sales meeting in [842] Chicago? A. Yes.

Q. Did he participate at all, or did he just sit there? A. He did not participate.

Q. Now, following the meeting in Chicago on February 10, did you report back to Kenneth M. Leighton regarding your observation that it was not going to work—that is, the use of these sales figures was not going to persuade the other distributors to give up their territories to Kenneth B. Leighton or recognize him as the national leader? A. Yes, I did.

Q. Following that conversation with Kenneth M. Leighton, do you recall having discussions with him concerning how to—discussions, if at all, concerning how to deal with the other regional distributors? A. There were numerous discussions after that point about this issue.

Q. And just tell me what the topic of those discussions—we'll pick them up in detail as we go, but what was the general topic of the discussions that you had with Kenneth N. Leighton after you reported this to him? A. The problem was, since we were not successful in convincing the distributors to recognize Ken, then we were back to the first recommendation that had been made at the last week in January, at Ken Leighton, Jr.'s, office, to cancel the distrib-[843]utors.

Now, the problem with that is: the distributors were performing adequately at this time. I still maintained that you—that, even though there is no contract, there was some type of verbal commitment to these people.

Q. Do you recall more than one conversation after your report to Mr. Leighton, Sr., concerning the February meeting on the subject of ways to get rid of the other distributors? A. Throughout the course of 1982, yes.

Q. Do you remember how many conversations on the subject of eliminating other distributors you had with Kenneth M. Leighton throughout 1982 and up to

your leaving Sorbo, Inc.? A. I can't recall the exact number.

Q. I would like to turn for a moment to the advertising budgets that were set for the regional distributors other than the two trade shows.

Other than the trade shows that you have identified, do you remember Hamilton Kent or Sorbo paying anything for the national advertising of Sorbothane? A. They were paying something into the national ad budget.

Q. Take a look if you would, for a moment, at Exhibit 442 in the book. Have you found it? A. Yes.

Q. Can you identify Exhibit 442?

* * *

[853] A. I don't recall. We were always asking for number of units, that had never stopped, on the original request.

Q. And, other than the need to keep Intermark out of the customers of the regional distributors, did Kenneth M. Leighton ever tell you of any reason why he wanted you to demand specific names of the customers? A. No. Primarily to control—

THE COURT: Is this what he said?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: Following up on what I originally said, was to primarily control the integrity of each of the distributorships.

BY MR. SHOHET:

Q. Now, during your employment at Hamilton Kent and Sorbo, Inc., did Kenneth B. Leighton ever ask you to give him information concerning the customers of other distributors? A. Yes.

Q. On how many occasions did he ask you for information about the other distributors' customers? A. Twice.

Q. What did he ask you to tell him? A. Number of customers.

Q. Did you give him that information on either of those occasions?

* * *

[856] *** Let me strike the question. Did you ever learn what, if any, disposition had been paid by Hamilton Kent to Sorbo of the customer lists that had been turned over by R.H.R. and Sorboturf? A. Yes.

Q. Did you learn of the disposition of the customer lists of R.H.R.?

MR. MAC ADAMS: Foundation, your Honor.

THE COURT: Lay a foundation.

BY MR. SHOHET:

Q. Did you ever see the customer list that you had received from Myron Mc Cone physically at the facility of Ohio Cushions? A. Yes.

Q. When did you see it there for the first time? A. After R.H.R. had been canceled.

Q. Were you then an employee of Spectrum Sports or Ohio Cushions? A. Yes.

Q. Did Kenneth B. Leighton give you any direction with regard to the use of that customer list in the performance of your duties? A. He requested that I mail these customers information on Ohio Cushions.

Q. Did you do so? [857] A. Yes.

THE COURT: Are we at a point convenient in your examination to take our afternoon recess?

MR. SHOHET: Yes, your Honor.

THE COURT: All right. Ladies and Gentlemen, I would ask you to please bear in mind the admonition I previously gave you.

We'll be in recess for 15 minutes.

(Recess.)

(Jury Present.)

THE CLERK: Please remain seated and come to order.

This United States District Court is once again in session.

THE COURT: Good afternoon, Ladies and Gentlemen.

The Court would find all members of the jury panel present, together with all counsel and plaintiff being present.

You may inquire, sir.

BY MR. SHOHET:

Q. Ms. Heinsohn, when we broke, we were talking about the customer lists that had been demanded by Hamilton Kent and Sorbo, Inc.

You mentioned that you saw the customer list at R.H.R. physically at the facility of Ohio Cushions. Can you describe the list that you were referring to? A. It was on R.H.R. letterhead, for one thing. I don't recall ***

* * *

[968] MR. SHOHET: I would offer it into evidence.

THE COURT: Is there any objection?

MR. BOMSTER: No objection.

THE COURT: It may be received as marked.

(Plaintiffs' Exhibit 333 received in evidence.)

BY MR. SHOHET:

Q. Now, turn to Exhibit 375, if you would, please. That's a telex authored by you and sent to a Brian Crowther on or about 10-1-82? A. Yes.

Q. Is Brian Crowther an employee of the company in England that manufactures Sorbothane? A. At that time.

MR. SHOHET: I would offer it into evidence.

MR. BOMSTER: No objection.

THE COURT: It may be received.

(Plaintiffs' Exhibit 375 received in evidence.)

MR. SHOHET: May I show it to the jury?

THE COURT: Yes.

BY MR. SHOHET:

I would like to read the last paragraph. It says (reading):

"The import of finished Sorbo parts to a U.S. customer is in direct opposition to a harmonious marketing relationship between our two companies."

[969] Do you see that? A. Yes.

Q. At that point in time, was it your understanding that there was a harmonious marketing relationship to be furthered by the elimination of the importation of Sorbo parts into the U.S.?

MR. MAC ADAMS: Objection, leading.

THE COURT: I will overrule the objection.

If you understand it, you may answer it.

THE WITNESS: Yes.

BY MR. SHOHET:

Q. Prior to offering that telex, did you have discussions with Kenneth M. Leighton, Sr., regarding the contents of that telex? A. Yes.

Q. Did Leighton, Sr., direct you to send that telex? A. Yes.

Q. Take a look at 377, if you would. Is this a telex which you received from Bryan Cruther at or about— A. Three seventy-seven?

Q. Yes. Three seventy-six. I believe they are duplicates. A. I have 376.

Q. Let's refer to it, then, as 376. Maybe I should just use the same document. A. It's a telex to me from Bryan Cruther.

* * *

[1009] LAURENE HEINSOHN—CROSS
BY BOMSTER

A. Yes.

Q. So that the jury understands your testimony, you are not saying he is an employee. You don't know that? A. That's true.

Q. Now when defective product was shipped out, did it go to all of the distributors? A. Yes.

Q. So that Junior received it, R.H.R. received it, Sorboturf received it, Lund received it, Vogel received it. They all did? A. I believe that this instance of Polyol was after Lund and Triad were dissolved. When you say did all distributors receive it, I don't know exactly what shipments and to who the Polyol went out to except to one that went to Sorboturf because she called me about it. I know that it was manufactured and packaged and shipped. I did not keep track as to what boxes they were in.

Q. Now, at the time that the—at the time that defective product you have described as defective went out, do you know who had final responsibility at the company to make a decision as to whether or not product was conforming to specifications? A. When you say conforming to specifications—

Q. Since my question is not clear to you, I will rephrase it. A. Thank you.

Q. Isn't it a fact that Senior had the final responsibility to ***

* * *

[1032] Ms. Heinsohn, I am off in the area now of customer lists; and there were a series of questions and some exhibits about customers lists, and what we were referring to when we talk about customer lists, as I understand the testimony, would be that the various distributors would be selling to retailers or others in their particular territories, and you were asking for information concerning the identity of the customers; is that correct? A. Yes.

Q. Now, from a professional standpoint, and to preface my question, you have talked to us a little bit yesterday about some things you studied and learned since you left, but I would like to take you back to your frame of mind, your frame of mind and your knowledge and your duties and responsibilities at the time you were at Hamilton Kent and at Sorbo. That's the point in time I would like to focus your attention on; and the setting of my question is going to be pretty much similar to my line of questioning to you when we talked about parts.

What were you about? What were your trying to do? What were your efforts about? Do you have the frame of reference that I am putting it in? A. Yes.

Q. Now, did you, at the time that you were marketing manager, come to a conclusion about asking distributors for customer information, customer lists?

* * *

[1067] LAURENE HEINSOHN—CROSS
BY VAIL

A. Yes.

Q. And do you know if that was October when Mr. Donsas was first retained? A. As best I can recall.

Q. Okay; and from, say, October of 1980, or thereabouts, through to the following May, Mr. Donsas didn't sell much of any Sorbothane products, did he? A. No, he didn't.

Q. Okay; and so, if I take in time now to May of 1981, Hamilton Kent had sold Sorbothane. Is that a fair statement? A. Yes.

Q. And am I also right to say that Hamilton Kent had purchased, say, over a Hundred Thousand Dollars' worth of equipment to manufacture Sorbothane, hadn't they? A. Yes.

Q. And that purchase had occurred even before you came to Hamilton Kent; isn't that right? A. I—as best I can recall.

Q. Sometime, probably early in May 1980; is that about right? A. I don't remember the exact delivery of that eqipment.

Q. Okay; and you were aware, then, that Kenny Leighton and the plaintiff got together to try to sell Sorbothane around Mr. Donsas, right? A. Yes.

Q. And the reason for that was that Mr. Donsas wasn't making [1068] sales and they saw that as an opportunity get Sorbothane out into the market; isn't that correct? A. Yes.

Q. That didn't last very long either, did it? A. No.

Q. A couple of months; is that correct? A. That is true.

Q. Okay. In May of 1981, Mr. Leighton, Sr., asked you to come up with a plan to market Sorbothane, since Mr. Donsas wasn't doing a very good job, correct? A. In late May, early June.

Q. Okay, late May, early June. And you spent a couple of weeks researching how to do that, correct? A. Yes.

Q. And I think you consulted with Mr. Leighton, Sr., and with Kenny Leighton in trying to come up with a procedure to finally sell some of this stuff; is that right? A. Yes.

Q. And, after that, it was about two or three weeks that you looked at how to do this; isn't that— A. Yes.

Q. You then made a proposal, a formal word, but you came up to them and said, "Here's how I think we ought to do it"; isn't that right? [1069] A. Yes.

Q. And you said—you said—was it to Kenny or was it to Ken, Sr., or was it to both of them that you presented this proposal? A. Ken Leighton, Jr.

Q. And what you came—the proposal that you came back to him with was a proposal to sell through what we have been referring to as regional distributors, correct? A. Yes.

Q. And you also came back with the people who you thought could fill those slots as regional distributors, did you not? A. I was a participant in that decision, yes.

Q. What you are saying, was it only you who came up with those people? Is that what you are trying— A. I did not draw up a list and say, "here are four people that would be adequate," No.

Q. First of all, did you have a lot of people from a large group of interested people from whom you could select regional distributors? A. We did no—we did no search for distributors, basically.

Q. That's what I am saying. There were—there was the plaintiff. There was her father. There was Arnie Lund, and there was Marty Vogel. They had all previously expressed interest to Hamilton Kent in the product, correct? A. Yes.

[1070] Q. So you knew about them and you knew they were enthusiastic about the product, correct? A. Yes.

Q. That was how you came to select them or propose them as regional distributors; isn't that true? A. That was part of it, yes.

Q. What was the other part of it? A. I am a little uncomfortable when you say that we—how we developed this distributor program. Once we identified that we wanted to use regional distributors, we did not do any kind of extensive search or come up with a list of qualifications of what those people should have or need.

Q. Okay. I didn't mean to elicit that. What I was trying to get at was: you knew of at least those four people, through their previous communication to Hamilton Kent, that they were interested; and it worked out—you knew that, did you not? A. Yes, I did.

Q. And it worked out that they happened to be located in different parts of the country, right? A. Yes.

Q. So it made it, as you answered to Mr. Bomster, pretty easy to assign different distributors to different territories, correct?

* * *

[1072] A. I felt that the distributor system, regional distributor system, would be the most effective way, yes.

Q. And you felt that the four distributors that were eventually selected were the best bet to finally make some money on the sale of Sorbothane products; isn't that correct? A. I did not think that they were the best, no.

Q. Did you express that to anyone? A. There were discussions about that.

Q. The reason that you selected them— A. It's not to say that I thought they were weak, but you are picturing a picture that I thought these were the best people in the United States to distribute the product. That's not true.

Q. The reason you went with them was because you didn't have much choice at the time; isn't that right? A. No. The reason we want with them, if you are asking the reason I went with them at that particular time—

Q. Yes. A. —is because I was not sophisticated enough to understand that I had not done a proper screening.

Q. Okay. Thank you.

* * *

[1075] A. I know we sent that earlier than October.

Q. September perhaps? A. No. I believe we sent that out in August.

Q. Okay; and you sent the same distributorship—proposed distributorship agreement to all of the distributors, didn't you? A. Yes.

Q. So, one went to Marty Vogel, one went to Arnie Lund, one went to the plaintiff, one went to the plaintiff's father, and one went to Ohio Cushions and Kenny Leighton; isn't that correct? A. Yes.

Q. They were identical, as far as you know? A. Yes.

Q. And, as you answered in response to Mr. Bomster's questions, you anticipated a give-and-take

between Hamilton Kent and the distributors in order to come up with a final form of a agreement; isn't that correct? A. Yes.

Q. And, in fact, you did hear from the distributors about that contract, didn't you? A. Yes.

Q. And, specifically, I believe you testified that Mrs. Mc Quillan spoke to you or called you and said that she was not [1076] satisfied with the—either the term of the agreement, being only one year—is that correct? A. Yes.

Q. And also the fact that it had a 60-day termination provision? A. Without cause.

Q. And she was dissatisfied with that, wasn't she? A. Yes.

Q. But she wasn't the only one who was dissatisfied with that, the only distributor; isn't that correct? A. That is true.

Q. You heard from other distributors about their wishing to include different terms in the agreement; isn't that correct? A. Yes.

Q. And, specifically, you heard from Kenny Leighton and Ohio Cushions that they didn't—they would prefer a different, a longer term to the agreement; isn't that right? A. Yes.

Q. And that they preferred a longer termination period, rather than 60 days, something longer; isn't that right? A. Yes.

Q. I show you what has been marked as Defendants' Exhibit S-9. Can you identify that, Ms. Heinsohn? A. It's a letter to me from Ken Leighton, Jr., dated November 6, 1981.

* * *

[1080] Q. I think you testified earlier that, again, the plaintiff was not thrilled—my words—to see Intermark come onto the scene; isn't that right? A. Yes.

Q. And, again, there was a concern that that would affect the territory; is that right? A. Yes.

Q. Forgetting for a moment whether it did or did not, whatever effect it may have had would have had the same effect on the territory of Ohio Cushions; isn't that correct? A. Yes.

Q. Thank you. I want to draw your attention to what I have been calling the pre-Chicago meeting, the meeting that was held, I believe you testified, in the offices of Ohio Cushions and was called by Mr. Burne. Do you recall the meeting I am talking about? A. Yes.

Q. And I think you said present at the meeting were you, Mr. Burne and Ken, Jr., and his father; isn't that right? A. Yes.

* * *

[1343] KENNETH M. LEIGHTON, SR.—DIRECT

* * *

Do you remember giving those answers to those questions in November of '86? A. Yes. I didn't get the letter that you were talking about.

Q. I know. We were talking about the July 1982 letter. A. You said 458?

Q. I think it was 459. A. I didn't get a chance to look at it. It isn't in here.

Q. We discussed it in court. I don't believe it's one of the documents I expected to ask you questions about because we already covered that with Laurene Heinsohn.

Let me go for a moment to the question of the termination of the distributorship of Sorboturf. We talked about several of the reasons that you had at the time, although you didn't think you needed any reasons; and one of the reasons that you gave in your second deposition was some involvement with Goodyear. Do you remember that being the case, sir? A. Yes.

Q. Now at the time that you—at the time you found out that Shirley Mc Quillan was selling Goodyear pads, or was involved with the Goodyear Company on a horseshoe pad; at this time, you [1344] had already appointed Sterivet as the distributor of the horseshoe pad made with Sorbothane, had you not? A. I am not sure of the time frame; but—

Q. Didn't you appoint Sterivet and Kent Vasko the distributor in December of '82? A. I don't recall the date, but that could be the date.

Q. Well, you knew at the time, in the summer of '83, that Shirley Mc Quillan had no prospect for becoming the national distributor, or any distributor of equestrian products manufactured by Sorbothane; correct? A. I don't quite understand your question.

Q. Hadn't you pretty much closed the door on Shirley Mc Quillan being the distributor for equestrian products when you found out that she was involved with Goodyear, for equestrian products? A. The equestrian product determination of whether she was a distributor or not, wouldn't be—was in the letter that I sent to her in that regard.

Q. Yes. A. I don't recall the date of that letter.

Q. Well, let me read from page— A. Whatever that letter—

Q. Let me read, then, for a moment. Let me represent to you that, on page 247 of your initial deposition, sir, you said that it was your understanding [1345] at the time—

MR. BOMSTER: Your Honor, if I may, I would like to be able to get the reference.

SHOHET: I am just trying to save time.

THE COURT: All right, all right. Give the page.

BY MR. SHOHET:

Q. Page 247 of the deposition taken in November of 1984.

I think it's the second volume. Maybe it's just as fast to read from it:

"Question"

This is line 12, page 247 (reading):

"Question: It was your understanding as of June 3, 1983, that's the date of your dear—the grapevine letter: June 3, 1983, that Shirley Mc Quillan was not distributor in the equestrian products; right?

"A. That's right.

"Q. It was also your understanding that she would not be selling Sorbo, Inc., equestrian products in the future; correct?

"A. I don't know the time frame.

"Q. Who was selling equestrian horseshoe products in the Southern California area, as of June 3, 1983?

"A. I don't know until—I know when we set up Sterivet. I don't know when that date was."

We'll get to the question of when Sterivet was [1346] appointed; but, as of that point in time, you were satisfied that Shirley Mc Quillan was not then selling or likely to sell, in the future, Sorbothane equestrian products? A. I think that that letter to Shirley in that regard is the answer to that question.

Q. All right. Now, you wanted—when you sent that grapevine letter, referred to the grapevine, that you had been working with Goodyear, you wanted her to give you some information in response to that? A. I wanted her to confirm that it was true or wasn't true, and the situation related to it because it would affect her position with the athletic distributorship.

Q. It's true, is it not, that at that point in time, you had never told her that she could not deal in competitive products; that is, products that were competitive with Sorbothane? A. I think that was an understanding when we set up the distributorships, and the reason we set them up the way we did was so they could have only Sorbothane products; and because other distributors that are nationally known, would have had several other products, and I didn't pursue that for that reason.

Q. But you never told her that she could not deal in other products that she wasn't selling; but that might have been competitive with Sorbothane products. You never told her that, did you?

* * *

[1354] A. I did not give it to Kenneth B. Leighton, Jr.

Q. Did you give it to Ohio Cushions? A. I gave it to a person that came over and picked it up.

Q. It's a fact, sir, that the confidential customer list that Shirley Mc Quillan gave to you after the series of letters that we have identified in this case, after she finally gave it to you and was terminated, you caused that listed to be handed over to a representative of Ohio Cushions. That's true, isn't it? A. A man from Ohio Cushions picked it up, yes.

Q. It was you that gave it to him; isn't that true? A. Yes.

Q. You never asked Shirley Mc Quillan whether it was okay for you to turn that customer list over to Ohio Cushions, did you? A. No.

Q. I would like to shift now to pricing—go into pricing with you for a moment, if I might. First of all, are you familiar with document called the B.T.R. Policy Manual? Do you know what that is? A. Yes.

Q. And it's true, isn't it, that B.T.R. published for all employees, at least senior employees, such as yourself, any B.T.R. Company, a comprehensive policy manual setting forth several things that you were to do and not do in regard to the administration of your responsibilities; correct?

* * *

[1373] *** A. I am not aware that there was a demand for it.

Q. There was a discussion among yourself, Laurene, and Maurice Hiles, about the demand for a lighter-weight insole, was there not? A. I don't think I was involved in any discussion of that sort.

Q. But you knew that the concept of a sports insole was being discussed by somebody, in the Summer of '82 or Fall of '83, weren't you? A. That's true.

Q. And was your—it's your testimony—is it not your position, that Spectrum Sports designed the sports insole, and that's why you let them be the distributor of that; correct? A. That's not exactly true. I have to correct that a little bit.

Q. Please do. A. He designed the sports insole. I was not in favor of this sports insole because I felt it would be competing with the insole we already had; and I thought that was doing a satisfactory job; and I wasn't really interested in expanding Sorbo, Inc. products into that category. He was convinced that that was a good item to have; so I said, well, if you want to have that item, you pay for the molds, and then you can have it; and that's your item.

* * *

[1484] Q. Did not, did you, because you don't say anything about anything other than the forecast for the drug store sales? A. Well, I might have had a difference, but I didn't feel it was worth recognizing.

Q. You knew, did you, that Mr. Keeling was going to B.T.R. with this information, and was going to make representations to B.T.R. to obtain exclusive rights for Sorbo, Inc., based on these figures, didn't you? A. I assume, from what I am reading, yes.

Q. You understand that you had a responsibility to be accurate when you provided such information for purposes of acquiring exclusivity on the patent, didn't you? A. It's difficult to be accurate on the forecast.

Q. As accurate as you could be? A. As accurate as I could be in forecasting.

Q. Take a look at Exhibit 508. A. 508.

Q. 508.

MR. VAIL: Multiple-page document.

MR. SHOHET: I have 508, a two-page document, counsel.

MR. VAIL: Two page.

MR. SHOHET: I would offer it into evidence.

MR. MAC ADAMS: We have three pages. Just so we're not—is it two pages dated May 12, '83?

MR. SHOHET: The first two pages are the May 12, '83

* * *

[1556] MARTIN VOGEL—DIRECT
BY STIVEN

THE WITNESS: It was sold at a higher price.

BY MR. STIVEN:

Q. How do you know that? Is that the way it was listed? A. It was listed at a higher price.

Q. All right. Let's talk about pricing practices and pricing policies for a moment, Mr. Vogel. Between the time that you were first asked to become a distributor of Sorbothane product, back in late July or early August of '81, and up to this period of time, January, 1982, just so you have a frame of reference, from the time you started as a distributor back in August of '81 and, let's say, up till the time of the February trade show in Chicago, during that period of time, did you have occasion to discuss with anyone at Hamilton Kent the pricing policies of Hamilton Kent as it affected the conduct of your distributorship? A. Yes, I did.

Q. Who did you talk to on that subject? A. With Laurene Heinsohn.

Q. Did you have several conversations with her on that subject during the period of time I have referred to? A. Yes.

Q. In these discussions with Ms. Heinsohn, tell me, and tell the jury, what Ms. Heinsohn told you regarding requirements that were placed on you as a distributor on the subject of what price you could resell your product to your customers in your [1557] area?

MR. MAC ADAMS: Objection, your Honor, leading.

THE COURT: No, I think we're focusing the inquiry.

What price discussions did you have with Ms. Heinsohn?

If you understand, answer it.

THE WITNESS: Yes, I understand.

BY MR. STIVEN:

Q. And, particularly, Mr. Vogel, focusing on what she told you about the price at which you could sell your product to your customers. A. Well, I was given a

suggested wholesale price—we call it a wholesale price—that a sporting goods store would purchase the product at. I was given a number, and there had been some price changes. I couldn't tell you which one it is right now, but I had a price that I was to sell it to that market at. I could get a higher price, if possible; but I could not get a lower price than that.

Q. Now, when you say you could not get a lower price, what did Ms. Heinsohn tell you with respect to whether or not you had the right to sell below the stated price? A. Well, I was told I did not have the right to do that; and, in fact, if I did sell it at a lower price, that was ground for termination of the distributorship.

Q. Ms. Heinsohn told you that? [1558] A. Yes, she did.

Q. Now, did Ms. Heinsohn also discuss with you what your obligations were as a distributor of Sorbothane product regarding the prices at which your customers could resell the product on the retail market to their retail customers? A. Yes, she did.

Q. What did she tell you in that regard? A. Well, she told me that I had a price that my stores were to sell the product at. They also had a minimum price that they were to sell the product at. They could sell it for a higher price, but not a lower price.

Q. What did she tell you you should do to try to ensure that this, in fact—this policy, in fact, was carried out? A. Well, with my geographic territory, I was to police that. I was to make sure that nobody was selling the product at a discount. If they did sell it at a discount, I was to try to buy it so that I could document that, and, at that point, warn that person that they were price cutting the first time, and hopefully that would cease. If it didn't cease, and they continued to do that, that they would not be shipped Sorbothane.

Q. And did you carry out those responsibilities? Did you follow Ms. Heinsohn's instructions in that regard? A. Yes, I did.

Q. Were there occasions when you so informed your customers [1559] that they were not to discount below the so-called suggested retail price? A. Yes. In fact, because that was one of the stipulations, very strong stipulation, we tried to turn that into a sales plus, by informing that store that this was—this may be an expensive product, and it was for that market for that time, a new and exciting, but that the price would not be discounted. People would not be slashing it to the public as it had been done by other products, and so they should not be uncomfortable on taking on this product because they would be getting the full suggested price for it anywhere within that geographical area that I sold.

Q. And with respect to your price that you were charging your customers, the wholesale price you were charging your customers, did you agree with Ms. Heinsohn that you would abide by her requirement that you not sell below the stated price? A. Yes. On any stock product. I specified that because any other types of applications would be worked on subsequently.

Q. Did you have any discussions with Ms. Heinsohn where you asked her about the possibility of selling Sorbothane product in your area to large discount stores? A. Yes, I did.

Q. What did Ms. Heinsohn tell you in that regard? A. I was told that I didn't have the right to just sell to a large chain because they sold in other areas; ***

* * *

[1562] A. Yes, she did.

Q. Did Miss Heinsohn make any comments to you at that meeting about what Hamilton Kent expected of you as a distributor regarding market penetration? A. Yes.

Q. What did she tell you in that regard? A. She gave us a figure. She gave us a figure of 80 percent market penetration.

Q. What did you understand that to mean? A. I understood that to mean that 80 eighty percent of the possible outlets for the product should be carrying the product.

Q. Did you find that to be realistic or unrealistic, in your opinion, at this time? A. I found it to be very unrealistic in the timeframe.

Q. Did you tell her so? A. Yes, I had told her that. My partner, Arnold Keltnick, at Runner's Log, specifically questioned Laurene and asked her to explain how she arrived at the 80 percent. Where did that figure come from? And she tried to explain a formula that she was using, and, upon further questioning, could not really support 80 percent as a realistic figure.

Q. Did Ms. Heinsohn make comment to you about how she viewed the Sorbothane product, the insoles and heels, vis-a-vis new [1563] competition? What did she tell you about how she saw its place in the marketplace at this time? A. Well, she saw it as being a totally unique product in its own class, where it didn't have to be marketed like any other product, had no competition on the market, and so it was in its own unique class in the sporting goods market.

Q. At that general meeting, was there any discussion by Ms. Heinsohn regarding comparison of your performance as a distributor vis-a-vis the performance of any other distributor as of that time? A. Yes.

Q. And what was said in that regard? A. Well, we were all given a number. I am trying to remember what. We were actually shown a graph as well, but certainly, we were given numbers and comparisons of what our

sales volume had been to date, and we were certainly less in numbers and graph than the—I guess the best distributor at that time.

Q. Who was portrayed at that time as the best distributor? A. Ohio Cushions, Ken Leighton, Jr.

Q. Did you have any—you said you had an individual or kind of a private meeting with Ms. Heinsohn as well to discuss your own conduct of your distributorship; is that right? A. Yes.

Q. What, basically, did you tell her during the course of this meeting.?

* * *

[1674] MAURICE HILES—DIRECT
BY SHOHET

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Q. You have served on that committee? A. Yes, I have.

Q. The patent for Sorbothane was issued in the United Kingdom in what year? A. In 1976.

Q. In addition, there are material patents for Sorbothane in several other countries, are there not? A. Yes, indeed.

Q. Approximately how many countries—in approximately how many countries is a patent of register for Sorbothane? A. In Australia, Japan, Brazil and, of course, the whole of Europe.

Q. And, in each of those—by the way, let's clear one thing up. There are patents for the material itself, Sorbothane, and then there are patents for its application. For example, the use of Sorbothane in footwear, the use of Sorbothane in horseshoe pads, those are separate patents, are they not? A. Yes, in many cases.

Q. Now, just talking about the material patent, take a look at Exhibit 345 in your book and tell us if that is a United States patent for the material Sorbothane?

(Pause.) A. Yes, that is so.

* * *

[1753] A. Well, the letter that you have directed me to, I don't see that it says anything.

Q. All right. Maybe I have picked the wrong letter. We'll come back to the subject, Dr. Hiles. A. Okay.

Q. What was your reason for reporting to Mr. Cahill on the subject of the treatment that—I will withdraw that question. I would like to shift now to "That's Incredible." You recall "That's Incredible" aired March of 1982? A. March 1, 1982.

Q. That was the date? A. That was the date.

Q. Before "That's Incredible" aired, do you recall being informed that John Burne had been selected as the distributor to distribute Sorbothane medical products? A. I introduced John Burne to Mr. Leighton.

Q. Would you tell the jury what, if any, difference there was in the Sorbothane pads, the insoles, that Mr. Burne was going to be distributing as the medical distributor from those that the athletic distributors were carrying? A. Well, initially, just color.

Q. They were different color? A. Yes; but, subsequently, there were other differences.

Q. Okay. A. When I say subsequently, I am talking about very shortly [1754] afterwards. Within the period that we have been told, prior to August 1, 1983.

Q. When they were initially introduced, the only difference was they were blue, correct? A. Yes.

Q. And, at some point thereafter, there were some additional changes made? A. Yes.

Q. What were the changes made to the Sorbothane from the Sorbothane that the athletic distributors were carrying? A. There were two grades. One was for the chronically sick, and one was for the acutely sick. The pad or the insoles for the acutely sick were softer, slower recovery, and they were colored light blue, and the others were colored dark blue.

Q. But the main product line of John Burne, the I.E.M. distributor, was insoles, was it not? Let me withdraw the question. What was the main product line being distributed by Mr. Burne during 1982? A. Purely insoles and heel inserts. In other words, the back piece of the insole.

Q. And they were packaged in—strike the question. What, if any, differences would a consumer observe between the insoles as they were being marketed and the heels as they were being marketed by I.E.M. versus the ones that the

* * *

[1836] debugged the equine version of Sorbothane, he will be able to go to Shirley and unlock that market opportunity, meanwhile, keeping this market preserved because of his continuing program with Wingfoot.

"Third ghost laid to rest."

I don't think I will read the rest of it.

BY MR. SHOHET:

Q. Did you have a discussion with Mr. Cahill, as reflected in this exhibit? A. Yes.

Q. Did you tell Mr. Cahill that Shirley of San Diego was the most promising distributor in that conversation? A. Yes, I did.

Q. And you were speaking of Shirley Mc Cone, were you not? A. I was, indeed.

Q. All right. I'd like to ask you a few questions, sir, on the subject of pricing. Did you ever have a discussion with Kenneth M. Leighton wherein he told you about pricing as it related to the retail price that was charged for the product? A. You mean the cost, the selling cost, or a pricing policy?

Q. A pricing policy or a practice as implied to retailers of Sorbothane. A. Mr. Leighton didn't discuss pricing policies with me, other than the fact that we were passing each other's office almost [1837] all day and every day. We may have had some conversation, which I couldn't really put a date on, where he—I think I remember on one occasion he said, "We are trying hard to keep the pricing policy so that we don't start a price war."

Q. Did he ever tell you that they were doing anything to keep the price at the same price as the retail level? A. When you say, "doing anything," he wasn't specific.

Q. Did the tell you that was his goal, to try and get the price equalized at the retail level? A. I understand his aim to be not so much an equality of price, but to prevent a price cutting war.

Q. All right. Now, do you remember an incident involving a retailer in West Virginia coming to the attention of Hamilton Kent because of a fifty cent below price, normal price charging? A. Yes, I do.

Q. When did that incident occur? A. Well, that occurred sometime in the middle—perhaps slightly towards the latter part '83.

Q. And the thing that caused that incident to come to the attention of Hamilton Kent was the fact that the prices were fifty cents below the retail price?

MR. VAIL: Objection, your Honor, leading.

MR. BOMSTER: Objection.

THE COURT: I will sustain the objection. You might [1838] ask him what he knows of that.

BY MR. SHOHET:

Q. What did you know of that, sir? A. I was told that.

THE COURT: By whom, sir?

THE WITNESS: I was told by Ken Leighton, Jr.—no, I withdraw that. I was told initially by Laurene Heinsohn that there were several stores in West Virginia that were selling fifty cents lower than Spectrum.

BY MR. SHOHET:

Q. And did you give a report to John Cahill on that subject at some point thereafter? A. Yes, I did.

MR. VAIL: Your Honor, can we have a point in time for this?

MR. SHOHNET: Yes. Take a look at Exhibit 96, specifically paragraph 3, on the second page.

Now, before I do so, let me—this is a letter that's dated December 29, 1983, correct?

A. Yes.

Q. But the report, under paragraph 3, some extraordinary allegations is a report of the event that occurred in mid-1983, is it not? A. Yes, it is. It was two or three months after it, at least. [1839] I have seen it before.

MR. SHOHET: I would offer, then, that segment of the letter as it reports to Cahill on the event that occurred in mid-'83 and read it into the record, if that's okay.

THE COURT: You can proceed in that fashion.

The—is there any quarrel with that procedure, Gentlemen?

MR. MAC ADAMS: Well, there is this time thing, the date of the letter and what this memo says relative to that.

THE COURT: I will note the objection and overrule it. You may read that.

The only problem I see with that, Gentlemen, many portions of the document, the reason I asked you, would you prefer, I am going to admit the document, and it seems to me easier to read it than not have the document come in and then excerpt.

MR. MAC ADAMS: I have no quarrel with that.

THE COURT: I will read that.

MR. SHOHET: It's Exhibit Number 96.

THE COURT: Ninety-six may be received in evidence for the limited purpose of reading that portion of it. The document itself will not come in.

MR. SHOHET: I will read that portion to the witness.

(Plaintiffs' Exhibit 96 conditionally received in evidence.)

[1840] MR. SHOHET: It's titled "Some Extraordinary Allegations," and this is the report you made to John Cahill (reading):

"A few months ago a chain of twelve sport shops in West Virginia were selling insoles at fifty cents below the normal price. They are not being supplied by Spectrum. The source was tracked back to the wholesaler and then to the distributor, and there the trail ends.

"It was, of course, always possible the goods were coming out of the back door on the second or third shift. Mr. Leighton decided that this was so,

and has told several senior executives, whom I am prepared to name, that I must be implicated, as I have been seen coming out of the plant at night loading my boxes with so many soles of insoles that it was a wonder I could get them all in.

"This rumor has spread to the employees on the shop floor. What an excellent way of promoting good industrial relations.

"Subsequently it was discovered that the source was a legitimate customer in Chicago with whom Mr. Leighton was dealing with personally and who had not received the price-cutting message."

End of reading.

[1841] THE COURT: Is that the report that you made to Mr. Cahill?

THE WITNESS: Yes, it is, sir.

THE COURT: Thank you.

BY MR. SHOHET:

Q. And you referred to—in that letter, you referred Mr. Cahill to a price-cutting message. What did you mean by "price-cutting message" as you referred to it in that letter? A. Well, I perhaps should rephrase the term "price-cutting" as price stability.

Q. What did you mean by that? A. It was the general aim to get everybody to sell at the same price to stop an escalating price war.

Q. Thank you. Do you recall a discussion with Kenneth M. Leighton regarding the potential for sale of these products in the drugstores or drug chain-type stores? A. Yes. That took place in the middle of 1983, in Mr. Leighton's office in the Company, with Mr. John Burne; and I was only in that meeting for a very short while.

Q. When did that meeting occur, sir? A. My best recollection, as I just said, I think sometime about the middle of 1983.

* * *

[1845] agreement, if it existed, whereby sales by Sorbo, Inc., were restricted to any particular territories? A. Well, there was a general agreement. I am not going to say that there was certainly not legislation, but there was a general agreement between those companies that manufacture Sorbothane not to cross each other's territories.

MR. MAC ADAMS: Your Honor, may we have a point in time?

THE COURT: Yes. This was before August of '83?

THE WITNESS: It was certainly so.

THE COURT: All right, fine.

Is there anything further of the witness?

MR. SHOHET: I do, your Honor. It will be brief, but I want to go through this subject matter.

BY MR. SHOHET:

Q. Did you learn of territorial restrictions in a meeting that occurred in 1981 or early 1982? A. Yes. I wasn't there.

Q. Who told you about these restrictions? A. I think Mr. Leighton, Sr., did.

Q. Okay; and did he tell you that there was in fact an agreement whereby no sales were made by Sorbo in Europe, and Leland and Birmingham didn't sell it here? A. I think, Mr. Shohet I would rather say "yes" to an agreement than I would say "yes" to restrictions.

[1846] Q. There was such an agreement, as you understand it? A. I understand it.

Q. When Sorborturf was terminated in or about August of '83, to your knowledge, could Sorboturf have purchased Sorbothane products from any source other than Sorbo, Inc., in the United States? A. I don't think so.

Q. Did Kenneth M. Leighton ever ask you to become involved in an attempt to get B.T.G. to grant exclusive license for the United States? A. Yes, he did; and that was sometime at the end of 1982.

Q. What did he ask you to do in that regard? A. Well, to use my past years as a consultant to the British technology group to turn the current, nonexclusive license, which means that other companies could be licensed in competition, into an exclusive license, which means that other companies could not be involved in competition.

MR. SHOHET: Your Honor, if I may take a moment to check the exhibits.

THE WITNESS: I was unsuccessful.

MR. SHOHET: I think I am about done. I would just like to check the exhibits.

I would offer the remaining exhibits that I designated and introduced through Hiles: 240-A, 324, 399, 246 and 345, if there is no objection.

* * *

[1885] MAURICE HILES—CROSS
BY BOMSTER

Q. Dr. Hiles, would I be correct in understanding that B.T.R., P.L.C., or a unit of it, has received a nonexclusive right to manufacture Sorbothane? A. No, that is not correct.

Q. Does B.T.R. have an exclusive right? A. It does in Europe, and it does in Australia, and it does in Japan. It doesn't in the United States, but that was their choice.

Q. At— A. When you—

Q. See if you can answer my question first. A. Sorry. I beg your pardon.

Q. So the license from B.T.G. to B.T.R., with respect to the United States manufacture, that's an exclusive license? A. No, it's not.

Q. So that, B.T.G. would be in a position to license others in the United States to manufacture, should they so choose? A. Correct.

Q. Mr. Shohet examined you with regard to the subject of defective product. Do you recollect that? A. Yes.

Q. Isn't it true, Dr. Hiles, that you make a distinction between product which is defective and product which is unsellable? A. I make a distinction between product defective and product

* * *

[1899] MAURICE HILES—CROSS
BY VAIL

* * *

Q. Right; but, from time to time, there were returns from the distributors for nonconforming product, correct? A. Yes. Some of those were justified, in my opinion, and some of them weren't.

Q. You were asked to take a look at the returns to see whether or not they were, in fact, defective; isn't that right? A. That is correct.

Q. And you got some returned product from Mrs. Mc Quillan, correct? A. Yes.

Q. You did? A. Are you going to ask me that question again?

Q. Let me start again. A. Let me give you the answer again. I received alleged defective product from Mrs. Mc Quillan via Hamilton Kent, and I was asked to comment on it; and the product, as I saw, didn't appear to me to be in the unsellable condition. Mrs. Mc Quillan sent product directly to me, and it certainly was defective.

Q. And, on several instances, Hamilton Kent showed you product that Kenny Leighton and Ohio Cushions had returned, claiming it to be defective; isn't that the case? A. Certainly.

Q. And, in fact, you received reports, or you were shown [1900] product that all the distributors had returned, from time to time, claiming they were not conforming; isn't that the case? A. Yes.

Q. I want to ask you about the support sole, Dr. Hiles. A. Yes.

Q. Do you recall—I know you testified in response to questions put to you by Mr. Shohet that you gave, you appeared on televison and radio—was it 10 to 15 times? A. Oh, at least, I have got a lot of tapes, but, no—I haven't actually gone to the trouble of counting them all.

Q. And you did that on behalf of Hamilton Kent or Sorbothane, correct? A. Yes, indeed.

Q. And you—part of your consultancy was to not only help Hamilton Kent, but to assist the distributors in marketing Sorbothane, correct? A. Well, yes. I know, appearing on public television and on public radio, that was going to help oversee everybody.

Q. And can you recall a period of time near or about August of 1982 when you flew down to Mobil, Alabama, to make a television presentation? A.Yes, I do.

Q. Okay; and can you tell the jury, who did you fly down to Mobil with? A. I went down with Mr. Leighton, Jr., and his partner.

* * *

[1915] MAURICE HILES—REDIRECT
BY SHOHET

Price equalization, what did you mean? You mean price equalization between the two countries selling products in their respective countries? A. I mean that, if a pair of shoes with Sorbothane inserts sells in the United States for thirty dollars, it doesn't necessarily mean that, when that same pair of shoes is sold, it sells for the same price, and therefore the potential cost of the Sorbothane insert is altered. In other words, it's proportion of the total price of the shoe.

Q. Prior to August of 1983, are you aware of any attempt to follow up on your suggestions regarding market cooperation and price equalization? A. We didn't have any problems with price equalization, certainly in market cooperation; and I talked to Leland and Birmingham, and I talked to Nike at great lengths, and Nike decided to stop that production run. It worked very well.

Q. Reading on in your letter, "raw materials"—why don't you read it? It will be easier. A. "Raw materials and labor vary considerably from U.S. to U.K." And that's absolutely true. We could not, for example, compete with the U.K. in the cost of a pair of heel inserts, and I am sure in many other products.

Q. Okay.

* * *

[2275] JOHN CAHILL—BY DEPOSITION

"Q. This ties in, and we'll see now. Turn, if you would, to Page 320 again under Paragraph B. It says, 'The following practices usually raise some antitrust questions and should be reviewed with legal counsel before they are initiated,' and then under Item Number 4, 'Require that customer not deal in the products of BTR, Incorporated's competitors.' Do you see that?"

MR. BOMSTER: I object, your Honor, not to the form of the question, but to the relevancy of the question.

THE COURT: May I have the question again?

MR. SHOHET: "Turn, if you would, to Page 320 again under Paragraph B. It says, "The following practices usually raise some antitrust questions and should be reviewed with legal counsel before they are initiated,' and then under Item Number 4, 'Require that customer not deal in the products of BTR, Incorporated's competitiors.'

THE COURT: Counsel may approach the bench.

(Proceedings were had between the Court and Counsel at the bench as follows:)

MR. BOMSTER: My objection is that the plaintiffs have dismissed informally, but on the record, the Clayton Act claim from the case, and this is elicited, I would understand, solely for the purposes of the Clayton Act. It's irrelevant, immaterial and inappropriate.

MR. SHOHET: It's an anticompetitive act in furtherance [2276] of the attempt to monopolize, even though it's not specifically alleged as part of the Clayton—

THE COURT: I'll note your objection. Overruled. I think it's proper.

(Proceedings were resumed in open court as follows:)

MR. SHOHET: Shall I read the question again?

THE COURT: Yes.

"Q. . . . Turn, if you would, to Page 320 again under Paragraph B. It says, 'The following practices usually raise some antitrust questions and should be reviewed with legal counsel before they are initiated,' and then under Item Number 4, 'Require that customer not deal in the products of BTR, Incorporated's competitors.' Do you see that? "A. Yes.

"Q. Was that ever raised as a— Did you ever approve the policy by Sorbo, Incorporated, if indeed there was such a policy, whereby its customers, whether or not they were distributors, were not to carry the products of a competitor? "A. First of all, I am not aware that such a policy existed. Secondly, I would find it very hard to define a competitor of Sorbothane, which is a unique product. Many people claim to be a competitor when in fact they are not.

"Q. You believe there are no competitors? "A. Unless they have broken a patent."

MR. SHOHET: Page 160, line 10:

[2277] "Q. So you participate along with the group chief executives in the creation of realistic budgets or profit predictions or sales predictions for subsidiaries? "A. I'll give them some guidelines, okay? We are a, quote, sell, not a, quote, tell company. We believe that if we told people what to do, we start to do their job, so we counsel them, and we advise them of the sort of shape we would expect their plan to have in terms of its revenues, its earnings, its capital, and its cash flow, and we are constantly disappointed."

MR. SHOHET: Page 166, line 6:

"Q. Who was the licensor of Sorbothane? "A. The licensor is a firm called BTG, British Technology Group. It is a government-owned organization.

"Q. Does it have any relationship with BTR other than it licenses its products? "A. Not at all, no.

"Q. And there are other sublicensees or licensees other than BTR—strike that. Who is the licensee for the manufacture of that product in the United States? "A. Sorbo, Sorbothane, Inc.

"Q. And they hold that license direct from BTG? "A. No, they hold it from BTR.

"Q. So BTR is the licensee, BTR, Incorporated? "A. BTR Limited is the licensee. I think it is the only [2278] licensee.

"Q. So any other manufacturer operates as a sublicensee of BTR Limited? "A. Yes."

MR. SHOHET: Page 167, line 4:

"Q. Now, does BTR Limited license direct to Sorbothane? "A. Yes.

"Q. And BTR Limited also licenses to other companies that manufacture Sorbothane in other parts of the world; correct? "A. They do."

MR. SHOHET: Turning to page 168, line 14:

"Q. So BTR is free to license anyone it chooses other than BTR Limited for the manufacture of Sorbothane products in the United States; correct? "A. It is.

"Q. All right. Now, but as between BTR Limited and the rest of the world, is it your understanding that the arrangements between BTR Limited and Sorbothane is one of an exclusive sublicensee? "A. Yes."

MR. SHOHET: Page 169, line 16:

"Q. You mentioned that you do not believe that other licensees of Sorbothane products are precluded from making sales into the United States, that is, other than Sorbothane? "A. They are not.

[2279] "Q. Are not precluded? "A. They are not precluded.

"Q. Would that include, that is, would the other licensees that are not precluded from making sales into the United States include sublicensees of BTR Limited? "A. Yes."

MR. SHOHET: 185.

I'm going to skip that, your Honor.

189. I have called to the attention of the Court and jury there's a reference to Exhibit 25 and it's actually Exhibit 359 in evidence.

THE COURT: All right.

MR. SHOHET: Beginning at page 190, line 2:

"Q. This purports to be a meeting you had with Mr. Leighton, Sr. in New York on June 7, 1983. Do you see that? "A. Yes.

"Q. That was at or about the time you were reviewing and considering this mass merchandising concept for Sorbo? "A. Yes.

"Q. Reviewing this document, does that refresh your recollection as to whether, as of August, 1983, the date when the letter was sent to my client and to Dr. Myron McCone informing them that they could no longer purchase Sorbothane products, that you had mentioned to Mr. Leighton your plan of mass merchandising?

* * *

[2375] JAMES FORSYTH—DIRECT
BY VAIL

* * *

Q. And did he ask you to do anything in connection with that new product? A. He wanted me to work on making drawings and designs and prototypes.

Q. Did you do that? A. Yes, I did.

Q. And what did you do after you completed your drawings or designs of the new product? A. Samples were given to Kenneth Leighton, Jr. and we worked awhile refining it and later, we went into production molds to produce product.

Q. And you understood—you understand at the time this conversation occurred Mr. Leighton was no longer—younger Mr. Leighton was no longer working at Hamilton-Kent, but was, in fact, working at Ohio Cushions. A. Yes.

Q. And after the sketches were sent out for molds, what happened, sir? A. Originally prototypes were made. We refined them a couple of times and then production toolings were made.

Q. And who did you understand paid for the molds, sir? A. Kenneth Leighton, Jr.

* * *

[2827] KENNETH LEIGHTON, JR.—DIRECT
BY MAC ADAMS

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Q. Now, I would like to focus on the point in time, up to the point in time where the decision was made to go into Sorbothane business. Other than expanding into the molding, as you earlier described it, were there any other changes in the business of Hamilton Kent, other than that, from what it was formerly, up to this point in time? A. No.

Q. At what point in time, or—strike the question. Do you recall when Hamilton Kent actually began to manufacture Sorbothane? A. John Walters started manufacturing Sorbothane, with a kitchen hand mixer and a bucket; and he would pour the parts into different items, to see the cure factor, see the shock absorber factors. It was a very low-budget operation in the fall of 1979.

Q. Now, when you say "cure factors," would you just briefly explain what you mean by cure, c-u-r-e? A. C-u-r-e. Sorbothane, as you saw in the film, weeks ago is a liquid in the initial stages. What we do is pour the material into an open-air cast, into a mold; and let the temperature cure the product into a semisolid. It's solid on the outside. It has the liquid characteristic feel to it; but it's actually [2828] a solid material after it's cured up, after it hardens.

Q. Now, following this initial hand-mixing or this simple manufacturing process, did Hamilton Kent acquire any equipment for the specific purpose of manufacturing Sorbothane? A. Yes.

Q. Would you describe to the jury what that equipment was, and approximately when it was acquired? A. The equipment was acquired in the Spring of 1980, and it was not all acquired at once. Primarily, we were dealing with machine manufacturing from the U.K., D and D Machinery.

The gentleman in the northern company subsequently died in an airplane crash because he was a stunt pilot, but we got the initial machinery from D and D Machinery. It took a while to get the machine put together and to bring it over to the U.S.

Q. And, approximately, or—strike the question. What was the approximate cost or purchase price for the

equipment that was acquired by Hamilton Kent for the purpose of manufacturing Sorbothane? A. It was roughly Seventy to Seventy-Five Thousand Dollars.

Q. And how many such machines were acquired, if you recall? A. Two.

Q. Eventually two? A. Eventually two.

* * *

[2851] Q. Was anything discussed about the actual manner in which the product would next be distributed? A. Yes, there was.

Q. What was discussed between you on that subject? A. The options that we felt we had on how to get the product to market.

Q. At what point in time did Laurene Heinsohn become involved in any discussions concerning the subject matter? A. I think Laurene was involved pretty much throughout, in the discussions of how to get the product to market.

Q. Now, as of the point in time we're discussing, would Laurene Heinsohn's job have called for her to have responsibilities relating the marketing of Sorbothane product? A. Yes.

Q. Would you explain to the jury what next developed insofar as the selection of the five regional distributors for the sale of the product? A. Senior had given Laurene the responsibility to come up with a marketing plan. Her recommendation to Senior was that regional distributors was one way to go, because, so far, national distributor had struck out; and, nationally known manufacturers of foot products were not interested; so, the option that she was considering was regional distributors.

* * *

[2853] Q. Approximately when was that decision made insofar as the regional, going with regional distributors? A. May, '81.

Q. And who made that decision? A. Senior.

Q. Other than your contribution with the M.A.A.N.A. guidelines, what, if any, input did you have into the decision to select regional distributors? A. None.

Q. At what point in time did you express interest of any sort about becoming a regional distributor? A. May of '81.

Q. To whom did you direct that expression of interest? A. I directed the expression of interest to become a regional distributor to Senior; and expressed an interest in possibly leaving Hamilton Kent to my wife.

Q. And what did you and your father discuss concerning that? A. The possibility of going into business for myself; some of the pitfalls that might accompany that. Really, that was about it.

Q. Now, there came a point in time when you gave your notice? A. Yes.

Q. When was that? A. June one, '81.

Q. About sixty days before you left?

* * *

[2872] Q. And how did you learn it? A. From Laurene.

Q. And where were you —where—strike the question. What did she say to you? A. She said that the sales figure for Ohio Cushions was inflated.

Q. What did you say in response to that? A. I don't remember saying anything.

Q. Did she say anything as to why that was done? A. Yes.

Q. What did she say on that subject? A. That she had, I believe, January sales back into 1981 in order to promote Ohio Cushions as a superior performer.

Q. Now, prior to that, as of that point in time, had you ever had any discussion with Laurene concerning that subject? A. No.

Q. Did you ever make a request of Laurene to do that? A. No.

Q. Were you ever in attendance among any people when such a request was made to have that done? A. No.

Q. After you learned that, what, if anything, did you do? A. I didn't do anything.

Q. Why not? A. No reason to.

[2873] Q. What do you mean no reason? A. In my mind, the sales meeting was over, two, three, four days, whatever it was, it was over that many days ago, whatever the purpose of those figures were certainly lost on me. I didn't see anything became of it.

Q. Now, following the February 1982 meeting, do you recall some testimony about Arny Lund no longer acting as distributor, Marty Vogel, no longer acting as distributor. Do you recall that? A. Yes.

Q. When was the first—strike the question. You did have some discussion at some point in time with Mr. Lund concerning working out some relationship about his territory; is that right? A. Yes.

Q. When did you first have that discussion with Mr. Lund? A. That discussion I had maybe a week after the Chicago sales meeting.

Q. How did that come about? Who initiated it? A. I think Arny Lund initiated that.

Q. What eventually became of those discussions? A. Eventually, we had come to an agreement on taking over responsibility for selling, shipping, invoicing, and carrying products for the northwest territory.

* * *

[2875] Q. When was that? A. That would have been about the third or fourth week of March of 1982.

Q. Would you explain to the jury how that came about? A. The—I had received a phone call from Arny Keltnick, asking me if I was still interested in coming to an arrangement on the northeast territory; and I indicated that I was; and he asked me if I would be willing to come to New York and meet with himself, Marty, and his brother, Ira.

Q. Did you travel thereafter to New York, for that purpose? A. Yes, I did.

Q. Approximately when was that? A. This was the end of March.

Q. And with whom did you meet at that time? A. I worked with Arny Keltnick and Marty Vogel.

Q. What, if any, arrangements did you work out? A. We worked out a very similar arrangement to the one that I had with Arny Lund.

Q. Following which, what, if any, activities did Mr. Vogel undertake in furtherance of the agreement that had been reached? A. I understand that he was a salesman for the company called Runner's Log, which was a partnership between Marty Vogel and Arny Keltnick.

* * *

[2877] Q. Do you recall the circumstances as to why you made that check payable to Triad? A. Yes, I do.

Q. Would you explain that to the jury? A. The one check that was made payable to Marty Vogel, was at Marty Vogel's request. The reason behind it was that he didn't feel he was getting the proper amount of money from Runner's Log that he felt he was entitled to; so, in lieu of that, I made the next check out to Marty Vogel.

MR. STIVEN: Your Honor, I am going to move to strike that portion of the answer, which was hearsay and non-responsive to the question.

THE COURT: I will note your objection and overrule it. The answer may stand, you may inquire on cross.

You may ask your next one.

BY MR. MAC ADAMS:

Q. Now, up to that point in time, you had worked out an arrangement where—Mr. Lund worked out an arrangement with Runner's Log and Mr. Vogel. Just generally, will you describe the scope of that arrangement? A. The arrangement was basically a commission compensation type basis, where, good to normal sales commission for our industry, or this type of product, an accessory product, it would be about ten percent commission of invoice; so, what I related to Arny and to Marty was that, for a period of six [2878] months, I would pay them thirty percent commission, which would allow them to recoup any type of investment they made into their distributorship; and then, for the next six months, and thereafter, they would get twenty percent commission; and this would allow them to make twice the amount of money that ordinarily would be for sales. If they had any sales representatives on their payroll at the time, this would allow them to be paid without taking additional money from them.

Q. And, at that time, what was the customary arrangement that you were using to pay your commission sales fee? A. Ten percent.

Q. Now, what was it that you were acquiring when you made this arrangement with Mr. Lund, and with Mr. Vogel's group? A. I wasn't acquiring anything.

Q. Acquiring? A. Acquiring was additional territory, which potentially was greater sales for Ohio Cushions.

* * *

[2880] *** insofar as him then representing any interest that Shirley Mc Quillan had in her territory, for purposes of that discussion? A. Yes. First of all, the meeting was face to face; but it was in my office; so I misspoke there; and, yes, Dr. Mc Cone represented himself as negotiating not only for himself—

MR. STIVEN: Excuse me. I am going to interrupt if he is going to testify as to things Dr. Mc Cone said. It would be hearsay.

THE COURT: Was that testimony by the witness relative to these discussions? I believe there were, was there not?

MR. STIVEN: By Dr. Mc Cone?

THE COURT: Yes.

I will note your objection and overrule it.

THE WITNESS: Yes.

BY MR. MAC ADAMS:

Q. What did he say in that regard? A. When Dr. Mc Cone was in Twinsburg, Ohio, he and I met, and we discussed the possibility of taking over responsibility for shipping and selling into his territory; and at that meeting, he represented that he was also negotiating for Sorboturf.

Q. What was discussed between you and he in that meeting, concerning that subject? A. The same type of commission, buy-out arrangement that I had with Marty Vogel, and Arny Lund?

* * *

[2884] Q. Would you briefly describe to the jury, the circumstances leading up to that, and then what was discussed at the meeting in California? A. What Shirley and I had agreed to was that myself and Mike Silvestro, and our accountant, would come out to, at that time, Del Mar, California; and meet with Shirley, Larry and her lawyer; and discuss the potential agreement of taking over sales responsibilities in Southwest U.S.

Q. And where did that meeting take place, in fact? A. Some restaurant in Del Mar.

Q. How long did it last? A. About five minutes.

Q. What was said; and by whom, at that meeting? A. The only person I remember talking to was her attorney at the time; and he requested our financial information, which we did not have; and he stood up and declared that the meeting was over.

Q. Was that, in sum and substance, all that was discussed at this meeting? A. Yes, it was.

Q. What next did you do following, immediately following the adjournment of the meeting? A. Immediately following the adjournment, I believe we went back to the hotel room we had, and packed our bags. The next thing, in anticipation of leaving; but I did make a phone call

* * *

[2886] *** Q. And then, would you please just take us through, in sequence, and chronologically, the series of discussions and contacts, on that subject, following your receipt of Mr. Fay's letter? A. Following the letter, since he did request an answer, I contacted Shirley, and let her know that we're interested in continuing conversation; however, I didn't feel that our financial information was necessary for her to view; and that we would be willing to see a proposal from her on the purchase sale of her

territory. Sometime later, I am going to say about two weeks later, we received a letter from Shirley, enclosing a purchase sale and agreement for not only Southwest U.S., which would be Sorboturf, but also RHR, which would be North Central, Dr. Mc Cone's territory; and, in the purchase sale agreement, we listed the terms of the potential sale.

Q. And what next developed after that, insofar as working out the arrangement? A. As—after reviewing the purchase sale agreement of both territories, I indicated to Shirley that I was not interested in the figures that were indicated in those documents.

Q. Did you ever make an offer to her concerning her territory? A. Yes, I did.

Q. What did you offer? [2887] A. A specific figure?

Q. Yes. A. I offered her Four Thousand Dollars a month for twelve months.

Q. What, if anything, did she say in response to that? A. I received a letter back from her rejecting the Four Thousand Dollars a month offer, with an explanation that she didn't feel it was the proper amount.

Q. And was there a point in time at which any discussion in contacts between you and her, on that subject, were basically closed? A. It was soon after that. I would say, possibly August of '82.

Q. From that point, from August of '82, up through August 1, 1983, did you ever have another discussion with her or a representative of her, concerning that subject matter? A. No.

Q. Now, I would like to turn, for a moment, to the subject of placing an order on hold that had been placed with Hamilton Kent, or Sorbo, at this time, by Sorboturf Enterprises, on or about June of 1982; do you recall, generally, the earlier testimony in court on that subject? A. Yes, I do.

Q. Did you ever make a call to Sorbo, and place an order for Sorboturf Enterprises on hold? [2888] A. Yes, I did.

Q. When? A. It would have been mid-June of 1982.

Q. Prior to doing that, had you ever had any discussion with Shirley Mc Quillan about doing that? A. Yes, I did.

Q. When? A. Prior to going out to California, in a telephone conversation with Shirley, she indicated to me that she had the product on order; and I, for one, was very optimistic that we were going to come to an arrangement; and felt that it was not economic to ship the product to California and then, in. lieu of an agreement, ship it back to Ohio; so, with her agreement, I put the product on hold.

Q. When you say, with her agreement, what did she say to you? A. She agreed to have the product put on hold.

Q. And was this at or about the time of a letter which is in evidence, in June, around June Sixteenth or Twentieth, 1982, the letter being from her lawyer, Mr. John Farrell Fay, to Kenneth M. Leighton, your father, concerning your putting an order on hold? A. That's exactly the time.

Q. Describe to the jury, the relationship or chemistry that took place between you and Mr. Fay during these negotiations. A. The chemistry was somewhat heated between Mr. Fay and [2889] myself.

Q. When you say "heated," what do you actually mean? Raised voices, yelling, discourtesy? A. I don't know about discourtesy. There was—there was elevated voices when we met in Del Mar, certainly, because he was screaming at me for not bringing my financial documents out to him. Other than that, I had no conversations that I recall, on the phone with Mr. Fay.

Q. Following—strike the question. With the exception of the order that we have just discussed as having been placed on hold, did you ever do that again? A. No.

Q. To the best of your recollection, is that the only time you ever did—ever placed an order on hold of Sorboturf Enterprises? A. Yes.

Q. Now, from the point in time when the negotiations were basically over between you; in about August of '82, up through August 1, 1983, would you describe what your contact was with Shirley Mc Quillan, during that approximately one-year period? A. It was very minimal. I believe that the only time that I had a face-to-face contact with Shirley was at an annual sporting goods show.

* * *

[2902] Q. Following your—turning your attention, rather, to the subject of credit limits; during the period of time that you acted as a distributor of Sorbothane, up to August 1, 1983, had you ever had a credit limit with Hamilton Kent or Sorbothane, Inc.? A. Yes, we did.

Q. When was the first such time? A. Initially, we had net thirty days as a credit limit. Then, the second change, I believe, in that, was net thirty days, with a ceiling of One Hundred Thousand Dollars.

Q. When did that occur? A. That would have occurred in the late Spring of 1982.

Q. And how was that communicated to you? A. I received a letter from Hamilton Kent or Sorbo, at the time, I believe, indicating that our credit limit was One Hundred Thousand Dollars, and explaining how that was to work.

Q. Following your receipt of that letter and up to August 1, 1983, did your credit limit again change? A. Yes, it did.

Q. When, after having been informed about the Hundred-Thousand-Dollar ceiling? A. No longer than a week or ten days later, we received another note saying that the credit limit was now Fifty Thousand Dollars.

Q. And what, if any, effect did that have on the operation of your business? [2903] A. Oh, the business, the cash flow, needless to say, dried up.

Q. Just briefly explain what you mean when you use the term, "cash flow." A. We—when we assume we're buying product, at net thirty days, we also sell our product at net thirty days; and so, hopefully, we have about the same money coming in as we need to pay out at the end of the month.

Now, that's not always the case, but, certainly, there is a margin there that a company can live with; and we were buying oh, at the time, roughly a Hundred to a Hundred Two Thousand Dollars' worth of product; and, in selling out most of that, if not all of that, each month, so, that we were staying about even, but, when the new limits were imposed on us, especially when we went from One Hundred down to Fifty, we found that we were dealing with about net twelve days, which means that we could buy on credit, enough product for twelve days' worth of shipping, but, after that point, we either had to pay C.O.D., or we just had to hold off on purchasing product.

Q. And what are very basic and practical implications of that? A. Basically, we needed to put a lot of cash into the business as well as possibly have stock outside, where we could ship our customers complete.

Q. Now, during this period of time, had you arranged for any financing, line of credit, or any loans from the banks for the operation of your business?

* * *

[2907] *** Q. When did you learn that? A. Shortly after they were terminated.

Q. Shortly after August 1, '83? A. Yes.

Q. Have you had any discussions with any person affiliated with Sorbothane, Inc., or Sorbo, Inc., as it may have then been known, concerning the potential termination of Sorboturf Enterprises on August 1, 1983? A. No.

Q. Following the termination of Sorboturf Enterprises, your company, Spectrum Sports, was acquainted as national distributor; is that right? A. Yes.

Q. Notice of that was about August 23, 1983? A. Yes.

Q. Effective, September 1, 1983? A. That's right.

Q. How did you become aware of that, the appointment was going to take place? A. Conversations with personnel at Sorbo.

Q. And had you ever had any discussion concerning that specific subject matter, at or about the time of Shirley Mc Quillan's termination? A. No.

* * *

[2952] KENNETH LEIGHTON, JR.—DIRECT
BY VAIL

Q. Who paid for that? A. I paid for that.

Q. What happened next? A. Then we had production molds made.

Q. Who paid for those? A. Ohio Cushions paid for those.

Q. Eventually, you produced the sports sole; isn't that correct? A. Sorbo produced it for us, yes.

Q. It went to market? A. Yes.

Q. And was there advertising for the sports sole? A. Yes.

Q. Who paid for that? A. We did.

Q. Draw your attention to period of time of late July, August, '81—excuse me, '83. Did you have any knowledge that—prior knowledge that Ms. Mc Quillan was going to be terminated? A. No.

Q. Nobody ever discussed it with you? A. Pardon me?

Q. Nobody had ever discussed it with you? A. No.

Q. All right.

* * *

[3000] KENNETH LEIGHTON, JR.—CROSS
BY STIVEN

* * *

Q. Did you come to learn that Dr. Mc Cone had understood that what you offered to him was thirty percent and twenty percent, as it had been to the other distributors? A. I received a letter to that effect, yes.

Q. After he informed you of that, then there were no further negotiations between you and Dr. Mc Cone regarding the takeover of his territory? A. No.

Q. And, in fact, he continued to operate in his territory as a distributor of Sorbothane product, until he was terminated in August of 1983; correct, sir? A. Correct.

Q. And therein, Ohio Cushions took over responsibility for that territory in August of '83? A. That's correct.

Q. Now, let's talk about your negotiations with Shirley Mc Cone, on the subject of taking over her territory. Am I correct, Mr. Leighton, that your initial proposal to Shirley Mc Cone was that you would take over her territory and pay her compensation based on

twenty percent of the sales in that territory for six months, and ten percent for the six months thereafter; is that correct? A. That was the initial proposal.

* * *

[3023] KENNETH LEIGHTON, SR.—DIRECT
BY BOMSTER

* * *

A. My experience of running companies was to delegate. I would like to find people that were able to assume the responsibility and delegate and let them run that part of the business that they were involved in. Mr. Cahill likes to do things a little bit differently. He likes to be involved somewhat, but not completely; so that he is aware of what is going on, and also, likes to make suggestions as to what the person running the company can do; and he doesn't come across that he wants you to perform everything that he is doing; but he likes to make the suggestions and follow up on them.

Q. Over the period of time you worked with Mr. Cahill, do you and he have differences in views as to what to do and how go about it? A. Yes. We had times when we didn't completely agree with each other.

Q. Now, I'd like to turn to the subject of Sorbothane, which is obviously, the central player in this whole discussion. Tell me and tell the jury, please, how did you become interested in Sorbothane? A. I heard about the material by being associated with B.T.R.; and, on one of my trips to England, I was able to follow up and visit a company called Permali; and Permali had Mr. Hiles as a consultant at this time.

So, I discussed it with Hiles and some other gentlemen [3024] at Permali; and I thought that the material was quite unique in its ability to absorb shock,

and, being a tennis player and—I felt that this; and, with jogging being at the peak that it was at that time, I thought, well, this type of product ought to go over well in the United States.

Q. Mr. Leighton, let's take a moment and talk about that. Do you have any hobbies? A. Yes.

Q. What are they? A. Tennis, golf, skiing, water-skiing, snow skiing.

Q. How long have you played tennis? A. The last fourteen years. I couldn't afford to play before that.

Q. You are presently retired, are you not? A. Not presently.

Q. Well, what other activities are you involved in now?

MR. SHOHET: Your Honor, I just want to be mindful of the 1983 cutoff, the fact that we're beyond it now and may slip into matters—

THE COURT: I will note your objection in that regard, but I assume this is foundational; so, you may answer, sir.

THE WITNESS: Pardon, I didn't—

BY MR. BOMSTER:

Q. What other activities are you involved in, and have you been involved in? [3025] A. In the town that I lived in, I have been on the school board for eight years, president of the school board for four years. I was appointed to the planning commission, city planning commission; and I have been on that for four years; and I was chairman of the planning committee for two years, and have been reappointed for another four years.

I am a trustee of a school in Main, that I have to visit three or four times a year for three-day periods of time; and I am a member of S.C.O.R.E. S.C.O.R.E. is the

—supposedly, you have to be retired or, at least they say, you are a retired executive; and I have done, performed a lot of work with S.C.O.R.E., which is part of the federal government S.B.A., which is small business association.

Q. So you have kept in contact with the business community? A. Quite a bit, yes.

Q. Returning to the story of Sorbothane and your involvement in it, when first you became acquainted with the product, can you tell us what, if any opportunity you see for Sorbothane here in the States? A. I had the feeling that there wasn't any material that could be compared to the shock-absorbent qualities that Sorbothane had. Even though there were many products on the market that were competing with it, I felt that this had something unique about it, that would be successful in the United States.

* * *

[3070] MR. BOMSTER: I move that in as a full exhibit.

THE COURT: Any objection.

MR. SHOHET: If I could have a time frame as to when it was prepared?

THE WITNESS: The dates that I stated, 7/1/83.

MR. SHOHET: No objection.

MR. BOMSTER: Your Honor, I would like to publish this.

THE COURT: It may be received as marked.

You may publish it.

(Defendants' Exhibit No. AH received in evidence.)

BY MR. BOMSTER:

Q. What was your purpose in making that memo at that time? A. So that I would have a record of seeing this ad and have it on file so that I would be able to refer to it later on.

Q. Now, I am concluded with the book at this point. You may close it. Mr. Leighton, after you received the letter from Shirley Mc Quillan in which she referred to someone playing around with Wingfoot, in response to your grapevine letter, what did you do? A. I wrote a letter terminating her distributorship with us.

Q. Will you please, Mr. Leighton, tell the jury why you decided to end that relationship? [3071] A. Well, the letter that I received, where Shirley stated that she was working with somebody that was associated with Equistep, and that somebody happened to be her, as far as I was concerned, she lied to me; and I don't feel that I needed anything else to add to the frustrations that I had with Shirley, except to terminate her. That I did.

Q. Now, when you say "anything else," what are you referring to? In addition to what? A. In addition to the frustrations I had in non-reporting on reports. She never sent financial information for our use in analyzing her credit rating; and the letters I had from her lawyers, it seems that every time I turned around, I was having problems; and I didn't feel that, to give Sorbothane a fair shake, that she was going to help to do that.

Q. Mr. Leighton, at the time that you ended the selling of product to Ms. Mc Quillan, did you consider that either she or you had any obligation to one another to stay together in that relationship? A. No.

MR. BOMSTER: No further questions.

THE COURT: All right.

Mr. Vail, Any questions?

MR. VAIL: No questions, your Honor.

THE COURT: All right. You may inquire, sir.

* * *

[3280] JOHN CAHILL—CROSS
BY SHOHET

Q. I'd like to turn briefly to your testimony about the licensing of Sorbothane sales. This morning Mr. Bomster asked you some questions about your understanding of how that arrangement occurred. I believe it was your testimony that a company called BTR Development Services Limited was the licensee from BTG; is that right? A. Correct.

Q. And then it went ahead and sublicensed or passed on the right to manufacture Sorbothane products to others; right? A. Right.

Q. Now, I take it BTR, Inc., your company, had no control over where any of these licensees sold their products, did it? A. Correct.

Q. I think you testified that the licensor, BTR Development Services, exercised, or may have exercised, some marketing control or coordination. Do you remember that testimony? A. Yes. I think I said it was a mail box.

Q. But it's true, is it not, that at no time prior to August of '83 were you aware of any preclusion or restriction by any of the licensees into where they could sell their products? A. Right.

Q. So, as far as you knew, the licensor had not told Hamilton-Kent that it couldn't sell in the UK; correct? [3281] A. Correct.

Q. And, likewise, the licensor had not told Leyland and Birmingham it could not sell in the UK; correct? A. I'm not aware of it, no.

Q. Okay. I just have a few questions on some of the documents, and I'm just about near the end of my examination.

We looked at a document this morning, Exhibit 446, which talked about Ohio Cushions responding to a

request for payment of its overdue account. I believe that document is in your book, if you need to refer to it. I wanted to ask you one or two questions about that issue.

Are you there? A. Yeah. This is notes of a meeting on April 28, '82?

Q. Right, "Control of Receivables," Item No. 2.

THE COURT: A number, for the record?
MR. SHOHET: Exhibit 446.
THE COURT: All right.

BY MR. SHOHET:

Q. It says, "We noted that Ohio Cushions had responded promptly to our request for payment of their overdue account."

Did you learn in or about April of '82 that Ohio Cushions had been extended in excess of $100,000 for over 90 days? A. We had both Ohio and IEM on very tight credit terms,

* * *

[3696] LAURENE HEINSOHN—DIRECT
BY SHOHET IN REBUTTAL

BY MR. SHOHET:

Q. Mrs. Heinsohn, could you identify Exhibit 1181 for us? A. It's a document that I drafted approximately the last week in January of 1982.

Q. Now, do you remember your testimony here in court about a meeting that occurred with Mr. Burne and Leighton, Sr., and Jr. in Kenneth B. Leighton's office? Do you remember that meeting? A. Yes.

Q. Can you place your preparation of this document in relation to that meeting? Was it before or after? A. After this meeting and before the Chicago trade show.

Q. The Chicago trade show, was that also the Chicago show, or the Chicago meeting at which all the distributors were invited to attend? A. Right.

Q. So it was between those two meetings, then, that you prepared this document? A. Yes.

Q. For what purpose did you prepare it? A. This document was prepared as a result of the agreement that we had made in the meeting in Ken Leighton, Jr.'s office, with John Burne and Ken Leighton, Sr. That agreement was to try to convince the other distributors that Ken Leighton, Jr., should be the national athletic distributor, and that they would have some relationship to him.

* * *

[3757] SHIRLEY MC QUILLAN—CROSS
BY MAC ADAMS

THE COURT: Has Counsel seen that?

BY MR. MAC ADAMS:

Q. Now, this is one of the records that was included among those that we recently reviewed; and it is, is it not, Mrs. Mc Quillan, in your handwriting, a statement to Cascade Orthopedics in Chester, California, for certain orders; and it's dated July 14, 1982; and it reads, quote, "prices reflect 15 percent increase from H.K."; and then it goes on with some additional information. That is in your handwriting, is it not? A. Yes, it is.

MR. MAC ADAMS: Your Honor, I move the introduction of M.M.B.

THE COURT: Is there any objection?

MR. STIVEN: No objection.

THE COURT: It may be received as marked.

(Defendants' Exhibit M.M.B. received in evidence.)

MR. MAC ADAMS: Your Honor, I would like to publish it to the jury.

BY MR. MAC ADAMS:

Q. Now, Mrs. Mc Quillan, reviewing the testimony that we just reviewed, you said you had gotten Exhibit J.P., the letter of the price increase, the first week or so of July. In fact, your business records show that, on July 14, '82, you were sending to Cascade Orthopedics the invoice which [3758] reflects prices—reflects 15 percent increase from H.K.; isn't that true? A. Well, can I explain this?

THE COURT: Yes, you may.

BY MR. MAC ADAMS:

Q. Is that what the exhibit says? A. That's what the exhibit says; but, if I can explain: Cascade Orthopedics was an orthopedic company that was set up with permission of I.E.M. Orthopedics as a subdistributor.

You will notice that the prices are not at the wholesale price that we were selling athletic insoles to our regular customers. Cascade Orthopedics was a separate subdistributor, and we shipped to them separately from our athletic customers, with I.E.M.'s permission; and, if you will also look on the rest of the invoices, you will see that I told customers that they had a period of time, 28 to 30 days, to continue to order at the old price, and that there would be a price increase coming, and until I got notice that that price increase had come, I couldn't even tell them the price that it was.

So this is a completely separate business relationship with another subdistributor, not with a regular athletic insole customer.

Q. Were these sales recorded in the books and records of Sorboturf Enterprises? A. Yes, they were.

* * *

[3914] SETTLEMENT CONFERENCE

* * *

THE COURT: Next section, gentlemen, deals with attempt to monopolize. I would give 124, 125, 26 of the Defendants, 126 of the Plaintiffs, 127, 128, 27, of the Defendants, which I have just come to, I think. Have I—I have already indicated that?

MR. MC GREGOR: Yes, you have, your Honor.

MR. BOMSTER: Yes, your Honor.

THE COURT: Gentlemen, you are way ahead of me. Didn't you know that I indicated I would give those in the next section?

MR. TARRANTINO: Your Honor, we didn't realize.

MR. BOMSTER: Your Honor, they understand one thing, I understand another. I assumed that all the charges you gave us were yours. He assumed the charges you gave were ours.

THE COURT: Okay. Fair enough, fair enough.

MR. BOMSTER: So I wasn't ahead of you. I was behind you.

THE COURT: Gentlemen, because I may have missed—continuing the call, Plaintiffs' 128, Defendants' 27 and 28 have already been covered. Plaintiffs' 129, Defendants' 30. Deleting reference to Sunkist and Reliance, I would give those.

Any quarrel with those particular instructions, Mr. Mc Gregor?

[3915] MR. MC GREGOR: Just one, your Honor. That would be 26. Just note our objections to 27 and 28 also, but, with respect to 26, this is a very important instruction, your Honor, and it's just not supported by the cases that they cite. It stands for the—their instruction states that you can't infer—

THE COURT: Give me just one moment

(Pause.)

THE COURT: All right. Your point, Sir, is what?

MR. MC GREGOR: The cases cited don't stand for the proposition in the instruction. *Oahu Gas* (phonetic) only address the monopolization claim, not the attempt to monopolize case. The footnote states, "because we uphold the jury findings on the monopoly—"

THE COURT: I have your point. Why should I give 26?

MR. BOMSTER: Well, I think it's quite correct, if there is an independent purpose, business justification for the business activity, then you have to have intent before you bring somebody in as a monopoly.

THE COURT: All right. I would decline to give 26. Anything else, Mr. Mc Gregor?

MR. MC GREGOR: Did you indicate that you were going to be also giving 31 and 32 of the defendants'?

THE COURT: If I didn't call them out, don't go to the list that I started in the beginning, saying that I would addi-[3916]tionally consider these, because I will at the end. The segment that I initially called.

MR. MC GREGOR: You mentioned these yesterday, 30, 31, and 32, as a group. I have no objection to those. Just for clarification, for argument purposes, we wanted to know.

THE COURT: I don't see them in this context. Thirty, I intend to give. Defendants' 30. Okay. Any other discussion as to those instructions?

MR. MC GREGOR: None other than as stated, your Honor.

THE COURT: All right. What about the Defendant?

MR. BOMSTER: One Twenty-four.

THE COURT: All right.

MR. BOMSTER: First, I would ask to strike lines 7 through 9 as unnecessary and argumentative; and then I would ask that, on line 9, after the word "Plaintiff," you say, "also alleges."

THE COURT: I think the "also" is fine. I will add that, but let me take a minute.

THE COURT: Why shouldn't I strike the first three lines, gentlemen, Mr. Mc Gregor?

MR. MC GREGOR: I will let Mr. Shohet speak to these, your Honor.

MR. SHOHET: It's not that critical.

THE COURT: Okay. I will strike that. Thank you.

[3917] MR. BOMSTER: Line 18, strike "sooner or later."

MR. SHOHET: That's right out of the pattern instruction.

THE COURT: I would deny the request to strike that.

MR. BOMSTER: Add as a sixth element antitrust injury.

THE COURT: I will deny that.

MR. BOMSTER: And then, for the record, on the next page, we would ask that you strike 5 through 9. That's, if I understand it, the lessee concept, which we disagree.

THE COURT: I will deny that and give it as indicated.

(Pause.)

MR. BOMSTER: One Twenty-five, line 11, the vertical price fixing doesn't belong to this.

THE COURT: What about that, gentlemen? Vertical price fixing, 125.

MR. SHOHET: I think it's correct the way it is, your Honor. Monopoly claims can be predicated on other violations of the antitrust law. Section 1 violations can be predatory conduct.

THE COURT: I will deny the request.

MR. BOMSTER: I have a thought that that's if it's shown that it advances the monopolistic activity.

THE COURT: I will leave it as it is.

MR. BOMSTER: Visco Elastic, on line 15.

THE COURT: Yes, that may go out. [3918] Anything else, sir?

MR. BOMSTER: That concludes it.

We have asked for our 30, 31, and 32. Thirty is in already, so it's 31 and 32.

THE COURT: May I see it?

MR. BOMSTER: Yes, sir. I think they don't have an objection to this.

MR. SHOHET: We have no objections to those, your Honor.

THE COURT: May I see it?

MR. BOMSTER: Yes.

(Pause.)

THE COURT: There being no objection to 31, 32, I wil give those in this segment. All right, gentlemen, unless there is something else, that will complete this segment, and we're moving right along.

MR. BOMSTER: On 127, just for the record, we have a similar lessee objection.

THE COURT: All right, same ruling.

All right, gentlemen, if that completes that section?

MR. BOMSTER: One Twenty-Nine, as other cases, the bracketed material will stay in.

(Pause.)

THE COURT: Pardon? I am sorry. I thought we were through with that.

[3919] MR. BOMSTER: I just wanted to be clear that, on 129, the bracketed material that they are going to delete will stay in.

THE COURT: Let me just—

MR. BOMSTER: If you like, at line 20.

THE COURT: Yes, that will all stay in.

All right. Anything else to this segment?

MR. BOMSTER: No, sir.

THE COURT: All right. Continuing, then, on conspiracy, conspiracy segment; and I think, Ladies and Gentlemen, I think we can conclude this between 12:30 and 12:45, hopefully; and so you will have some time for a break for lunch; but I intend to keep going so that we can resolve this. I think we're moving now to the end.

In this section, Gentlemen, I would give Defendants' 31 and 32.

MR. MC GREGOR: No objection.

MR. VAIL: Those have already been accepted by stipulation.

THE COURT: Those, I think, were the ones—see, Gentlemen, we have done it again. I realize that the fault lies with me in that regard, but, all right, I will give 31 and 32, as I indicated.

Continuing, Rico.

Now, on the Rico section, I would intend to give 83,

* * *

[4349] FINAL INSTRUCTIONS OF THE COURT

* * *

In determining whether Plaintiffs have met their burden of establishing that the Defendants threatened a lawsuit alleging infringement of this Sorbothane patent, knowing that there was no basis for the infringement action, you are to determine whether there is clear and convincing evidence that the Defendants threatened the lawsuit with knowledge that there was no infringement.

You must further find that the threatened patent infringement suits were done for the purpose of eliminating competitors in the relevant market.

This next series deals with attempt to monopolize.

The Plaintiff also alleges that it was injured by the Defendants' unlawful attempt to monopolize. In order to win on the claim of attempted monopoly, the Plaintiff must prove each of the following elements by a preponderance of the evidence: first, that the Defendants had a specific intent to achieve monopoly power in the relevant market; second, that the Defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent; third, that there was a dangerous probability that Defendants could sooner or later achieve its goal of monopoly power in the relevant market; fourth, that the Defendants' conduct occurred in or affected interstate commerce; and, fifth, that the Plaintiff was injured [4350] in the business or property by the Defendants' exclusionary or restrictive conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, you must find for the Defendant and against the Plaintiff on Plaintiff's attempt to monopolize claim.

If the Plaintiff has shown that the Defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of relevant market or the Defendants' marketing power.

This would deal with specific intent in that area, Ladies and Gentlemen.

In this case, the Plaintiff argued that the Defendant—correction. In this case, the Plaintiff argues that the conduct underlying the claim of attempt to monopolize also constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act.

Specifically, the Plaintiff claims that the Defendant engaged in vertical price fixing, horizontal territory division arrangement, and a group boycott in furtherance of the attempt to monopolize the market for athletic shoe inserts, Polymer shoe inserts, and Sorbothane athletic shoe inserts in the United States.

If you find, on the basis of this conduct, that the [4351] Plaintiff has proved a substantial claim of restraint of trade under the instructions you have received contained in Section 1 of the Sherman Act, then you may infer from such conduct that the Defendants have the specific intent to achieve monopoly power.

Specific intent may be inferred from conduct clearly threatening to competition or clearly exclusionary. That is conduct whose anticipated benefits are dependent upon a tendency to discipline or eliminate competition and thereby enhance a firm's long-term ability to reap the benefits of monopoly power.

Ladies and Gentlemen, I think what we ought to do is take another brief recess. It seems that my time estimate is very much awry. There are more instructions I have to give you.

I think we should complete these before we all go to lunch, and I think, unless I get a substitute here, I think we better just—and the reporter—we ought to break for another ten minutes, and then we'll resume the Charge to the Jury.

If, Ladies and Gentlemen, you would please bear in mind the admonition I previously gave you, we'll be in recess for ten minutes.

(Recess.)

(Jury present.)

THE COURT: Good morning again, Ladies and Gentlemen. [4352] The Court would find all members of the Jury Panel present, together with Counsel.

Continuing, then, Ladies and Gentlemen, the instructions relative to attempt to monopolize.

Another element of the offense of attempt to monopolize is that the Defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent.

An offense of an attempt to monopolize is concerned only with the unreasonable acts or practices that have the actual or reasonable or foreseeable effect of substantially impairing competition in a relevant market in an unnecessarily restrictive way, or of destroying competition.

The antitrust laws encourage vigorous and honest competition and the mere fact that one company is successful in winning sales or market shares from competitors does not mean that its conduct is exclusionary or anticompetitive.

Conduct that involves the introduction of superior product, the lowering of production costs, the exercise of superior business judgment, or reasonably responding to competition should never be found to be exclusionary or restrictive, but some practices that promote competition

in the short run may be illegal under the Sherman Act if they impair competition in an unnecessarily restrictive way or are used to obtain monopoly by eliminating competition.

Although the exclusionary or restrictive acts need not [4353] be sufficient in themselves to bring about a monopoly, Plaintiffs must prove that the acts or practices engaged in by the Defendants had a significantly exclusionary or restrictive effect of a type which, if continued, are likely to result ultimately in a monopoly.

In some cases, it may be necessary to prove a relevant market and a firm's power in that market in order to show a dangerous probability of success. A dangerous probability of success may be inferred from direct evidence of specific intent, or from conduct of accomplishing the unlawful design, or evidence of conduct alone, provided it is conduct that forms the basis for a substantial restraint of trade or is clearly a threat to competition or clearly exclusionary.

Therefore, if a Plaintiff has not proved that Defendants had power in a relevant market, you still may find for the Plaintiff on the claim of attempt to monopolize if you find from the direct evidence that the Defendant specifically attempted to achieve monopoly power, and that you further find that the Defendants engaged in conduct harmful to competition in furtherance of that intent.

Furthermore, even in absence of direct evidence, not specific intent, you may find for the Plaintiff if you conclude either that the Defendants engaged in conduct that formed the basis for substantial restraint of trade under Section 1 of the Sherman Act under the instructions you have received from [4354] determining

conspiracies or combinations in restraint of trade, or that the conduct was plainly harmful to the competition, or exclusionary.

That is, that its benefits were dependent upon its tendencies to discipline or eliminate competition and enable the Defendant to reap the benefits or monopoly power in the future.

Unilateral refusals to deal are acceptable only in the absence of purpose to create or maintain monopoly. Thus, a business may violate Section 1 of the Sherman Act if it exercises its power to deal with others, including its own distributor, to achieve or maintain a monopoly.

Supply and credit restraints imposed by a manufacturer upon a single distributor in an attempt to put the distributor out of business and further the manufacturer's attempt to monopolize have been held to be sufficient to support a claim for attempted monopoly.

Plaintiffs must also establish that the injury which she claims to have been suffered was an injury to her business or property if she is to recover damages.

The term "business" includes any commercial venture or interest, and you are instructed that a Plaintiff has been injured in its business if you find that she suffered injuries to any of her commercial interests or enterprises as a result of the Defendants' alleged antitrust violations.

[4355] The term "property" includes anything of value which Plaintiff owns or possesses. You are instructed that Plaintiff has been injured in her property if you find that anything of value which she owns or possesses has been damaged as a result of the Defendants' antitrust violations.

You are further instructed that the Plaintiff has been injured in her property if you find that she has paid an inflated price for goods or services, or has lost money as a result of the Defendants' alleged antitrust violations.

Now, Ladies and Gentlemen, we come to an opportunity to place a new tape in our device.

(Pause.)

Continuing our discussion, then, Ladies and Gentlemen, on conspiracy to monopolize, I would define that for you.

There are four essential elements which the Plaintiff must prove in order to establish its claim that the Defendants conspired to monopolize within the meaning of Section 2 of the Sherman Act.

First, that there was a conspiracy between the Defendants to monopolize an appreciable amount of identifiable interstate or foreign commerce of the United States, which commerce Plaintiffs claim to be the market as previously discussed.

Second, that, if so, the Defendants entered into such conspiracy with a specific intent to monopolize that commerce.

* * *

PLAINTIFFS' EXHIBIT 8

SORBO
Sorbo Incorporated

Innovations in Advanced Polymer Technology

August 1, 1983

SORBOTURF ENTERPRISES
2572 Unicornio
La Costa, CA 92008

ATTENTION: Ms. Shirley McCone

Shirley,

We hereby give you notice that we no longer will except any purchase orders from Sorboturf Enterprises. Including, without limitations, your purchase order #4438.

Signed,

SORBO, INC.
/s/ K. M. LEIGHTON
K. M. Leighton, President

KML/pp

cc: Steve Howard, Adler, Pollock and Sheehan
Providence, RI

1670 Enterprise Pkwy Twinsburg, Ohio 44087/
in Ohio (216) 425-7151 Toll Free 800-321-0171/
TELEX 810-427-9201—CALL BACK SORBO INC TWBE

PLAINTIFFS' EXHIBIT 10

SORBO
Sorbo Incorporated

Innovations in Advanced Polymer Technology

SORBOTURF ENTERPRISES
2572 Unicornio
LaCosta, CA 92008

Attention: Ms. Shirley McCone

Dear Shirley,

Several areas regarding the management of your territory need to be discussed. Sorboturf's responsibility is to promote and service sporting good retail outlets with the Sorbothane athletic shoe line, marketed under the brand name "Sorbothane" and in blue and silver colors, products of which Sorbo, Inc. owns.

As long as Sorbo's policy allows a distributor to have an exclusive territory, then it is Sorbo's responsibility to police all territories.

To maintain the integrity of each brand line it is imperative that some control is maintained in distribution. This control should also support each distributor's proprietary efforts in their prospective markets and territories.

In summary, athletic distributors should not place the Sorbothane athletic line into anything other than athletic retail outlets. Drugstores or regular shoe stores are not to be serviced by an athletic distributor.

We have asked several times for a customer list. (Stating store type, main product, etc.) Your ignoring this matter doesn't help Sorbo Inc. in our efforts in maintaining control of the marketing of Sorbothane.

Control is based on information which our distributors are responsible in supplying to Sorbo, Inc. Information derived from your customer list would support our efforts in analyzing such things as:

- —Major buying centers (Centralize vs. store level)
- —Trends
- —Pricing
- —Advertising
- —Size of market/penetration

Your customer list would also enable Intermark, our Family Shoe Store distributor, to respect your interests by not contacting the Family Shoe Stores that you are currently servicing. We requested this information twice, the first being in June, and as yet we have not received such information.

[2] If you don't assist Sorbo, Inc. in supplying the information they request, then the purpose and value of a controlled territory is valueless.

Signed,

SORBO, INC.
/s/ LAURENE HEINSOHN
Laurene Heinsohn, Marketing Manager

LH/pp

1670 Enterprise Pkwy Twinsburg, Ohio 44087/
in Ohio (216) 425-7151 Toll Free 800-321-0171/
TELEX 810-427-9201—CALL BACK SORBO INC TWBE

PLAINTIFFS' EXHIBIT 30.2

"CONFIDENTIAL-COUNSEL AND EXPERTS ONLY"

6/83

To: John C. Cahill

From: C.A. Risley

Copy: KML

Subject: Sorbothane Marketing Company

Thank you for clairifying the concept that you and Ken Leighton discussed in New York.

THE MARKET THREAT

I think that you gentlemen are absolutely right. Sorbo faces one major threat: someone could come out with a Sorbothane-like product and point it at the consumer market. Judging by the testimonial letters that Ken receives there are clearly many people who need Sorbothane who would not ordinarily enter an athletic shoe store.

Whoever acts to fill the void in the mass market will need to use television advertising to create the demand for his product. That television exposure will affect other markets beyond consumer because the product name will be established in the minds of all types of customers from industrial to athletic.

DEFENSIVE STRATEGY
THE NEED TO PRE-EMPT THE MARKET

If Sorbothane is to remain the dominant product when competitors enter then we must be the ones to get to television first. Ken is already doing a test market on

television to determine whether it will work for the athletic market and we all hope it will prove successful. But television is truly a mass medium. You are being charged to take your message to every spectrum of society and only a small percentage of those viewers ever get into an athletic outlet.

GETTING THE MOST BANG OUT THE TELEVISION DOLLAR SO THAT WE HAVE THE MOST DOLLARS TO USE ON TELEVISION

In order to get maximum bang out of television advertising you must have your product in the places where most consumers go every week: drug stores and discount stores. But if we were to take our existing product into the drug and discount stores then we would be cutting the throats of the small retailers who have made Sorbo what it is today. Discount stores would take small margins that the retailers couldn't afford and would effectively put them out of business in Sorbothane products.

NEED FOR A NEW MASS MARKET PRODUCT

The only way to avoid this sort of massacre is to approach the mass market with a product designed specifically so that it won't function in the athletic or medical applications. Fortunately it is possible to do this and decrease our costs at the same time.

The mass market is a market with primarily walking applications. So our new product could be the Sorbothane Walking Insole. Now, walking involves decelerations which are only 40% as large as the decelerations experienced in running. Therefore a thickness of Sorbothane which served adequately for walking would tend to "bottom out" in running

applications. In addition, in walking all the shocks come to the heel and metatarsal whereas in basketball and tennis the whole foot can become involved in a quick stop. So the Walking Insole could employ Sorbothane only at the Heel and Matatarsal.

HOW TO GET TO MARKET

The mass market is more price sensitive. I have been told that we could not hope for a suggested retail above $9.95. If Sorbo were to use a complete chain of distribution this price would put a squeeze on our own margins. Drug and discount chains prefer to buy direct from the company that makes the product, feeling that they get better communications and better service. Also there is less need for distribution in this market because most shipments are in bulk to chain owned warehouse centers.

We should therefore approach this market ourselves without the insertion of outside middlemen.

THE SORBOTHANE MARKETING COMPANY

As I see it the model that you and Ken propose is designed primarily to keep this marketing company out from underfoot at Twinsburg. You have told me that the reason Sorbo is doing so well while L&B is dragging is that you and Ken moved Sorbo away from the rest of the hubbub and gave it an efficient place to operate. As a marketing man I hate to admit it but nothing will bring a plant to a stop quicker than having a couple of sales offices in close proximity to the plant door.

The model is, in fact, very similar to Stowe-Woodward which systemically keeps its sales functions located away from its plant operations. And it provides an opportunity for Ken's eventual successor to do his job without constantly monitoring Ken's retirement plans.

THE REACTION OF THE EXISTING DISTRIBUTION

Whenever any market is taken direct by a company the independent distributors get very nervous. That is something that we don't want at all. The medical market is necessary for the existence of an athletic and consumer market and the athletic market still has enormous potential growth. So we must act to calm the fears of our distributors. I recommend writing term contracts for specific product areas allowing for annual renewals if predetermined levels of sales are met.

In addition, the advertising should be designed to position the walking insole away from the sportsole.

Television copy like ... "Hi this is Larry Bird. Professional athletes use Sorbothane Sportsoles to product their feet, ankles, knees and lower back from injury do to foot strike shock.

Now you too can get Sorbothane protection and comfort for everyday use because Sorbothane has introduced the Sorbothane Walking Insole" ..... will help both the new and existing product.

If we work openly with our distributors and make it clear that we want them all to be successful in their area then we can all succeed together and the independent distributors can be one of the strongest elements of the Sorbothane network.

TIMETABLE

You mentioned the possibility of starting the new company on July 1. This would create the possibility of getting on television in August assuming we had product to ship at that time. Getting product would require the

cooperation of Ken Leighton in development and tooling or it may be possible to adapt something from L&B for the initial market test. L&B already make an insole with only heel and metatarsal of Sorbothane though the molds may belong to IEM (we would have to check and work out something with IEM if that were the case).

PRO FORMA FINANCIALS

In accordance with your instructions I have worked up some projections which take us through calendar year 1984. These numbers assume market tests in 2 or three cities followed by a regional and then national rollout.

Assumptions

SALES are shown growing to a $3Million per month rate by Dec.1984. This is in accordance with the estimates I have been given by various retailers and they also tie closely to John Burne's independent estimates for pharmacies alone.

COST OF GOODS has been estimated to allow Sorbo 150% of costs and to allow for payment of a 5% royalty to BTR.

COMMISSIONS are included at 10%. The primary method of selling this market is through manufacturers reps who specialize in specific chains and who know where the bodies are buried. We won't be using reps for the test market but we will use them for the rollout.

SALARIES includes pay and benefits for a secretary and a salesman from July through March 1984. In March I have added the costs of a packaged goods specialist who would be hired to replace me.

FEES includes payments to my management company and one half the cost of Maurice Hiles contract as well as any outside consulting we might need to hire.

ACCOUNTING assumes that we would use some other division to start and that the costs would grow at 10% per month.

FREIGHT is calculated at 2% of Sales.

TOOLING is a plug to avoid á profit in the opening months.

I have assumed that only one third of the TEST ADVERTISEMENTS will be effective and have therefore added extra advertising expense during the test period.

NORMAL ADVERTISING is 20% of sales. This would put us in the top 2% of consumer goods advertising rates but it is appropriate for developing the market. The $3million spent in 1984 would be about 1/5 of Xerox or IBM's television expenditures and about 50% of Eastern Airlines. Sorbothane would rank in the top 200 television advertisers. I would expect a cut back to 10-15% over 1985.

RECEIVABLES are shown at 45 days which would be fast if sales weren't growing so quickly that new sales diluted the effect of slower paid old sales.

INVENTORY is a 30 day buffer. Ken's distributors tell me he delivers better than that.

PAYABLES are shown at 30 days (no point in slow paying Ken) except for Advertising which is an average of 45 days. We will be billed on the fifth for ads which ran the previous month and we have 30 days to pay.

DEBT to BTR assumes that we begin with no equity and that all dollars needed to fund the business are lent by BTR. When debt goes negative in late 1984 that is because we have paid off all of BTR's investment and are now pumping new money back into the parent.

PLAINTIFFS' EXHIBIT 30.3

INTERMEMO

Date: January 28, 1982

TO: Mr. K. M. Leighton

FROM: J. C. Cahill

COPIES:

SUBJECT: I.E.M.

"CONFIDENTIAL-COUNSEL AND EXPERTS ONLY"

Dear Ken:

I would like to discuss the concept of giving I.E.M. an exclusive the next time I see you, which I hope will be sometime in February.

We have a super product here. Every indication we have from the marketplace tells us we are in a seller's market. This means that we can, at the moment, at least write our own terms, make our own price, and establish our own marketplace.

If we are right in these presumptions, concluding exclusive agreements with third parties today buys us absolutely nothing. We have seen recently that by hanging in tough with Nike we have got them to change their position fundamentally on a crucial issue in the supply agreement. This tells us that like it or not they can only get this product from us. The product we are offering is something that they don't want—they *need* it—and therefore they are prepared to bend their rules to comply with our requirements.

We can argue that in the long pull this intransigent attitude on our part is going to come back and hit us between the eyes. The likelihood of that happening will be determined by the life of this product.

What I would like to do is defer a decision until we meet and ask you to consider, as the man running Sorbo and a part owner, why we should do anything which would diminish the value of our business and get nothing in return.

Best wishes and keep those orders coming, Ken.

Sincerely,

/s/ John
J. C. Cahill

JCC/bt

PLAINTIFFS' EXHIBIT 35A

BTR INC.
TEL. 401-331-7300

2200 HOSPITAL TRUST TOWER, PROVIDENCE, RHODE ISLAND 02900 USA

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

June 27, 1983

STRICTLY PRIVATE & CONFIDENTIAL

Mr. George W. Keeling
BTR Industries Limited
Horninglow Works
Burton on Trent, Staffs
England

Dear George:

Thank you for your note enclosing your letter of June 14 to Dr. Hills. We were delighted to have you with us, George, in the United States, and it was a great personal pleasure for me to have such a pleasant dinner with you and our colleagues from Sorbothane.

The waters are still clouded on this side of the Atlantic as regards Goodyear's intentions, BTG's posture and, perhaps most importantly of all, the role of Maurice Hiles in the endeavor to conclude another license in the United States. I am working on this myself and am using John Burne of IEM as a deep throat.

To this end, I am meeting with Maurice on Tuesday, June 28, and in an informal and friendly way will remind him that his two champions are John Burne and Ken Leighton. Both of these nice people have been extremely kind to Maurice over the years. They have understood

his peculiarities. They have pandered to his every wish. They have helped him financially, and they have put him where he is today in the United States. I want Maurice to understand that any clandestine arrangement he comes to with Goodyear which will promote another license by BTG in the Americas would have a much more damaging effect on his two guardians than it will have on BTR.

I hope that I can bring sanity and rational thinking back into this situation and get a commitment from Maurice that he will honor the consultancy agreement he has with BTR in both the letter and the spirit, and that he will stop communicating with Goodyear on matters that he is not entitled to pursue in view of his commitment to BTR.

Turning to a brighter note, I am pleased to let you know that we are now well on the way to forming Sorbothane, Inc. Sorbothane, Inc. will be a separate company from Sorbo and will be wholly owned by BTR, Inc. Its purpose will be to take Sorbothane products to the mass markets. Our first venture in this area will be an insole of some sort which we will sell to ordinary white folks like you and me through the drugstores of the United States.

It looks as if it's going to be a winner, George. The potential is large. Initially, Chris Risley will head up the company. He will get it into orbit and identify someone who not only can take over from him to run Sorbothane at the beginning of 1985, but a man of sufficient stature and experience and dynamism who could take over Sorbo when Kenny decides to hang up his skates at some point in the future.

Apart from providing an exciting opportunity for us in the United States, I think that we will be able to pass significant volumes of business back to Andrew Foggan at L&B, providing that he has the capacity that we need and that we can land it into the United States at a competitive price.

George, do keep in touch on Sorbothane. I am very excited about it and want to be part of the team.

Thank you also for the help you have been to us and also the sterling work you are doing with BTG.

In the meanwhile I send you my very best wishes and remain

Sincerely yours,

/s/ JOHN
John C. Cahill

JCC/bt

PLAINTIFFS' EXHIBIT 47

INTERMEMO

"CONFIDENTIAL"

DATE: June 18, 1982

TO: J. T. Gentile

FROM: J. C. Cahill

COPIES:

SUBJECT: *Sorbo Price Increases*

Were these price increases implemented with your concurrence?

I thought that we were going to have a study which would tell us by how much we needed to increase our prices to achieve a running rate of 40% PFO by year-end. Have we gone off at half cock again?

/s/ J. C. CAHILL
J. C. Cahill

JCC/bt

(1) I became aware of the June increases "after the fact" via a copy of the attached letter. I was not asked for nor did I give any concurrence.

(2) I honestly don't recall discussions of a study to see how much the increase should be. We did discuss the level of sales volume required to get to 40% PFO and I vaguely recall saying that as we increase our volume we would obviously kick up PFO as a % of sales.

Joe

PLAINTIFFS' EXHIBIT 57

SORBO
Sorbo Incorporated

Innovations in Advanced Polymer Technology

July 2, 1982

Shirley McCone
SORBOTURF ENTERPRISES
13963 Boquita Dr.
Del Mar, CA 92014

Dear Shirley,

As you know, I have received two letters from your attorney and talked with him on the phone. I don't intend to respond to his letters, but I think it's important that you know where I stand.

First, let me say that it was never my intention to pressure Sorboturf into selling its distributorship to Ohio Cushions. I was trying to do you a favor, since I thought you wanted to get into the equestrian end of the business. As I told you in Chicago, the potential for the equestrian market is so tremendous that we want a distributor who will devote full time to that part of the business.

It, therefore, seemed to me that you would want to work out a reasonable deal with Ohio Cushions that would give you some income while you phased into the equestrian market.

Since you are evidently concerned with pressure from me, and are not interested in working anything out that is reasonable with Ohio Cushions, lets leave things exactly as they were before our meeting in Chicago.

You may continue to sell Sorbothane heels and insoles to retail sports outlets in your territory, however, Sorboturf will not be permitted to sell equestrian products since we want a distributor for that market who will give their full attention to it.

Call me if you have any questions.

Sincerely,

SORBO, INC.
/s/ KENNETH M. LEIGHTON
Kenneth M. Leighton, Pres.

KML/pp

1670 Enterprise Pkwy Twinsburg, Ohio 44087/
in Ohio (216) 425-7151 Toll Free 800-321-0171/
TELEX 810-427-9201—CALL BACK SORBO INC TWBE

PLAINTIFFS' EXHIBIT 64

SORBO
Sorbo Incorporated

Innovations in Advanced Polymer Technology

June 3, 1983

SORBOTURF ENTERPRISES
2572 Unicornio
La Costa, CA 92008

ATTENTION: Shirley McCone

Shirley,

We hear via the grapevine that you are working with Goodyear developing a horsehoe pad with their Wingfoot material!!

Signed,

SORBO, INC.
/s/ K. M. LEIGHTON
K. M. Leighton, President

KML/pp

PLAINTIFFS' EXHIBIT 64.3

SORBO
Sorbo Incorporated

Innovations in Advanced Polymer Technology

June 14, 1983

SORBOTURF ENTERPRISES
2572 Unicornio
La Costa, CA 92008

ATTENTION: Ms. Shirley McCone

Shirley,

Enclosed is a copy of the letter I sent to you June 3rd, 1983.

I would appreciate it if you would inform me of your position in regard to the situation mentioned in my letter.

Signed,

SORBO, INC.
/s/ K. M. LEIGHTON
K. M. Leighton, President

KML/pp
Enc: 6/3/83 letter

PLAINTIFFS' EXHIBIT 133

CONFIDENTIAL
COUNSEL AND EXPERTS ONLY

JUNE 15, 1982

SORBOTHANE DEALERS

ANNOUNCING PRICE INCREASES

EFFECTIVE JULY 15, 1982

Ohio Cushions, Inc. announces a price increase on the SORBOTHANE shoe inserts. Effective on all shipments as of July 15, 1982, prices for the inserts are as follows:

	Cost	Suggested Retail
SORBOTHANE Heel Inserts (all sizes)	$ 5.00/pr	$ 9.95/pr
SORBOTHANE Sole Inserts (sizes A-G)	$ 8.00/pr	$15.95/pr
Size H*	9.00/pr	16.95/pr
Size I*	10.00/r	17.95/pr
Size J*	11.00/pr	18.95/pr

*NOT AVAILABLE IN BOXES

Terms: F.O.B. Twinsburg, OH
C.O.D. initial orders
Net 30 with current customers

Ohio Cushions will continue the level of service that is unmatched in the industry. The amount of national promotion is increasing constantly, making more people aware of the benefits of SORBOTHANE.

SORBOTHANE ORDER LINE
TOLL FREE 800-321-4145

NO COST AND FASTER!

PLAINTIFFS' EXHIBIT 240A

"CONFIDENTIAL"

NOTES ON MEETING WITH MAURICE HILES
at Providence—Tuesday, 6/28/83

1. Maurice had been well prepped for this meeting—all deep throats please take note.

2. *Background*

Ken's stand alone, divide and rule, parochial attitude has got through to Hiles. Leighton's absentmindedness has also become an infuriating factor in the Hiles/Leighton relationship.

According to Hiles the relationship went into a nosedive after Lurene quit. Leighton took over handling all inquiries (commercial and technical) and shut Hiles out of participation in Sorbo.

This infuriated Hiles. The fact that Ken had not informed Hiles that Crowther and Foggan were visiting Twinsburg last week added salt to the wound.

I told Hiles that this behavior was consistent with Ken's personality. He hadn't informed me either. It irritated me, too, but didn't make me put a death wish on the man. We had to keep our relationship with Ken Leighton in proportion.

Hiles acknowledged that had it not been for Ken Sorbo would never have made its mark in the Americas. There was a grudging acknowledgment that Leighton was the centerpiece in the fortunes of Hiles, Burne, etal.

3. *John Burne/IEM*

Today John Burne was on Hiles' badlist. He was an opportunist. He was superficial. He didn't consolidate his position (example: Australia). When Hiles met Burne, he was "selling his furniture." I inferred that Burne was about to go belly up. I was wrong. Burne was a furniture salesman.

Hiles had become so disenchanted with BTR/Permali (the division where Sorbo was residing at the time of this episode) that he had formed a company, Biba, in which his wife and daughter held 50% of the equity and Burne was invited to take up the remaining 50%. The name of this company was subsequently changed to IEM and allegedly Burne bought out the two silent shareholders.

The moral of this story. Hiles is the great provider. Had it not been for him Burne would still be selling furniture. Ergo, Hiles owes Burne nothing—Burne owes Hiles a bundle. (First ghost laid to rest.)

4. *The Goodyear Story*

Act One, Scene One: Hiles in concert with Akron University is doing work with Sarathon and the Goodyear heart unit.

Through his connections with the Goodyear heart unit, Hiles is informed that Goodyear has developed a product which is a competitor to the Sorbothane sole. Hiles is told this informally in order to preserve a state of friendship and equanimity between Goodyear and BTR.

Hiles passes this information and sample on to Leighton. Hiles is asked by "Goodyear" about Sorbothane. Hiles tells Goodyear that he is under contract to Sorbo (BTR). Under pressure reads the same paper to Goodyear

management that he has read to countless groups around the United States. He does not regard this in any way as a conflict of interest.

Act One, Scene Two: Dateline London. Goodyear personnel approach BTG for a license to produce a "Sorbothane" product in the United States. They are offered a non-exclusive license and learn about Sorbolite. (Second ghost laid to rest.)

Hiles has no further contact with Goodyear.

Act Two, Scene One: After BTR Central R&D take over responsibility for development of Sorbothane, Hamish Cameron (then in charge of the unit) tells the world that he will develop a "better product" than Hiles had and effectively cut off Hiles' income from BTG. In 1982 Hamish Cameron is transferred from Central R&D to Permali. George Keeling, ex-Serck, takes over as head of this unit.

Within the last eight months Keeling registers a patent with the UK Patent Office and notifies BTG that they (BTR) have another product with the same characteristics as Sorbothane. Motive in notifying BTG "information passing." Leighton informed that BTR now have a competitive product. No information or samples are forthcoming.

Hiles sees this as another slap in the face to him and a positive move to curtail or cut off royalty income from BTG. (In passing, he tells me that he has never received a penny from BTG in royalty income.)

At the end of this act one is left guessing as to where this revelation leads us.

Act Three, Scene One: The equine market. Hiles is critical of Leighton in launching Sorbothane into the equine market too early. The product is not ready to take to market. It has inherent weaknesses. It will not work. Hiles has turned his back on the product.

As a result, Leighton stops feeding or requesting information to and from Hiles. He is again cut out of an important development.

Because Hiles believes in Sorbothane; because Hiles believes that we can return to a spirit of collaboration with Ken Leighton, he persuades Goodyear to grant the most promising distributor (Shirley of San Diego) an exclusive for the United States to sell Wingfoot.

Wingfoot does not have as good properties as Sorbothane for insoles. It is allegedly more appropriate today than Sorbothane for the equine application.

Hiles' motives in persuading Goodyear to give an exclusive to Shirley is to box Goodyear in and place their future with a company which is short of funds and will not be able to do justice to the product.

Hiles continues with his logic that when he has debugged the equine version of Sorbothane, he will be able to go to Shirley and unlock that market opportunity, meanwhile keeping this market preserved because of his containment program with Wingfoot. (Third ghost laid to rest.)

The above is Hiles' explanation of his nefarious association with Goodyear over the past several months.

He states quite clearly that if he had wanted to conspire against BTR and pass on know-how to a third party confidentially, he most certainly wouldn't have chosen

the venue nor the behavior pattern that took place between himself and Goodyear. In this he has an excellent point.

I asked Maurice to consider the opportunities open to him by collaborating fully and frankly with BTR. He claims that he wishes to do this but is unable to do so at the moment because of the attitude of Leighton toward him and for unnamed reasons in respect of IEM.

He was delighted with the news about Sorbothane. He claims that he has been urging that Sorbo enter the drugstore market for some considerable time. He believes he can make a contribution to this area of activity. He is very willing to do so. He likes Risley and respects him.

I believe that provided we are prepared to spend the time with Maurice, understand his peccadillos, and involve him, we can contain him and keep him on our team where he can make an invaluable contribution to the growth of Sorbothane in the Americas.

I regard the time I spend with him as well spent.

John C. Cahill

JCC/bt
7/1/83

PLAINTIFFS' EXHIBIT 268

9 March 1983

CENTRAL DEVELOPMENT DEPARTMENT

BURTON-ON-TRENT

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

Monthly Report—February 1983

To: Mr. W.D.T. Tapley From: G. W. Keeling

1.0 *Beaufort, Australia*

Further samples of adhesive and of good and bad joints have been analysed using the facilities at Birmingham University and Loughborough University.

The confidential report covering several months of thorough investigatory work on this project has been revised and re-issued.

We are awaiting instructions whether to proceed with the factorial experiment that had been planned to verify the findings of the investigation.

2.0 *Environmental Monitoring*

At the request of Permali a survey is being made of the methods available for measuring the levels of phthallic anhydride in the atmosphere. This is used in hot curing of resins.

3.0 *BTR Silvertown Pipeline Services*

To meet the requirements of sealing medium pressure gas pipelines it has now been shown that a material with tensile strength of about 1000 psi

is needed. Material with this strength has been prepared and is being evaluated by Pipeline Services.

4.0 *Cow Proofings, Compressible Blankets*

Cow Proofings have evaluated the samples that we obtained for them. The short fibre reinforced grades are showing greater promise than unreinforced materials but compressibilities need to be reduced.

RAPRA have reported to us on the dynamic physical characteristics of open and closed cell materials.

From the results of these investigations at Cow and at RAPRA the better candidate materials are being selected and a meeting will be arranged with Cow to recommend and decide on future work.

5.0 *Hertfordshire BTR, Sponge Rubber Moulding*

A good deal of ground work is going ahead in preparation for this project although it will not be practicable to make a determined start until the Gottfert Elastograph is delivered and installed in about 4 weeks time.

Gottfert have tested some samples from Herts BTR and the results show that the batches can be classified on the basis of the torque and pressure readings but the records at Herts are not comprehensive enough to be able to trace back to how these different samples behaved when processed.

Arrangements are being made for a representative from Herts BTR and from Central Development to visit two organisations that have been using Gottfert Elastographs so that we can learn from their experience.

Samples of "good" and "bad" Volvo door strips were analysed by thermogravimetric analysis and this revealed no significant difference between them.

6.0 *BTR Australia—Ranger*

We are trying to resolve the problems that have arisen between BTR and RAPRA over the investigation that RAPRA did for us on materials from the Ranger tailings line.

Contact has been made with Resinform on the possibility of them supplying GRP pipes for a new tailings line that BTR Australia has been invited to tender for.

BTR Vitaline are also co-operating with BTR Australia on the use of rubber lined pipes.

7.0 *London Artid Plastics*

Investigation of the embrittlement of the UPVC spiral in Hoseflex is continuing and it looks as though an answer is coming into sight.

Some preliminary enquiries are being made to find the best available method of making PVDF film in fine gauges of 30, 75 and 150 microns to meet an enquiry from Metal Box.

LAP have interested May and Baker in blown bottles in polysulphone. A meeting is arranged for next month.

8.0 *M.O.D.*

The body stimulants project is progressing steadily. Techniques are being developed for the handling of gelatine to enable different grades to be prepared for ballistic tests.

9.0 *Sorbothane*

We are again pressing BTG hard to convert our present Sorbothane licence into an exclusive licence for U.S.A.

Negotiations are moving ahead with Mitsui Nisso for them to take a sub-licence from us. I believe that it will be possible to come to an Agreement if we decide that is in the best interests of all BTR Sorbothane businesses.

Orders have been received by Central Development from Esso and from Ocean Inchcape for a small number of seals on the legs of offshore platforms.

Advice has been given to BTR South Africa on what they suspected were corrosion problems between Sorbothane and aluminum.

10.0 *Silverlock*

Silverlock is to be shown at an "Underwater Repair" symposium in Aberdeen. It will be in association with a paper that is being presented by AMTE. (Admiralty Marine Technology Establishment)

Work on underwater strain gauges and underwater repair using Silverlock is continuing at the National Maritime Institute.

Some work has been done on alternative grades of Silverlock for Stowe-Woodward.

11.0 *Robotics*

11.1 The application has been lodged with Department of Industry for a grant towards the BTR Silvertown Chemloc spraying system. A decision is expected from D of I before the end of March which would still leave the project just about on its planned time programme. We have reason to expect a favourable decision.

11.2 The design for Leyland and Birmingham's Sorbothane dispensing robot and associated conveyor system has been completed and submitted to management for approval. Their decision will be made early in March.

11.3 Design work continues on the schemes for Silentbloc and for London Artid Plastics.

12.0 *Microprocessors for Industrial Control*

12.1 Installation of the microprocessor control is in progress on the re-breathing bag production line at Leyland Medical.

12.2 The Merlin microprocessor is due on site at Concargo in the middle of March. This is for monitoring and later also controlling, the forming of large GRP panels. An application for D of I aid under the Mapcon scheme is being prepared.

There had been difficulties in obtaining weigh scales to give suitable electrical output signals. The problem has been overcome and the scales are now on site.

12.3 The microprocessor control designed for the 11D Banbury at Farington is being assessed for financial justification.

12.4 Design work continues on the control system for the Leyland and Birmingham CV salt bath line.

13.0 *Patents*

13.1 *Patent Applications Being Prepared*

Serck Heat Transfer's "Pipe Range" of heat exchangers, Divisional Applications are being prepared as requested by the U.K. Patent Examiner. Similar Divisional Applications will be prepared for the corresponding foreign Applications.

13.2 *Patent Applications Filed*

a) Beaufort Air-Sea Equipment's "Canopy" patent filed in West Germany.

b) Serck Heat Transfer's "Fluted Tube Hole Joints" filed in U.K.

c) Worcester Controls "Valve Seats" filed in U.K. Not handled by BTR Development Services but noted for interest.

d) Design Applications filed for Hi-Flex 850,000 and 860,000 Series Ferrules in Australia, Denmark, Finland, France, West Germany, Italy, Spain, Sweden and U.S.A.

13.3 *Patent Applications Published*

The European Application for BTR Silvertown's Medium Pressure Encapsulation System, designating Belgium, Denmark, France, Italy, Holland.

13.4 *Official Actions on Patent Applications*

a) Substantive examination requested for Serck Heat Transfer's method of Charge Air Refrigeration in U.K. and in France.

b) Preliminary search report received from U.K. Examiner for Serck Heat Transfer's "Pipe Range" of heat exchangers.

13.5 *Patents Abandoned*

BTR Silvertown's Application for "Steel Tube Manipulation" is being withdrawn because the U.K. Examiner's search report showed that the invention is not new.

14.0 *Trade Marks*

14.1 Trade Marks Being Prepared

a) "Armour Plate" and "Armour Sheath" for BTR Silvertown, the proposed names for wear resistant chute liners.

Searching the U.K. Trade Marks Register.

b) "Serckstream", proposed name for Serck Heat Transfer's new range of tubular coolers. Searching the U.K. Trade Marks Register.

14.2 *Trade Mark Applications Filed*

Applications to register "Gamma", "Theta", Sigma" and "Kappa" in Benelux, France and Switzerland for squash rackets for Goudie Squash International.

14.3 *Trade Mark Oppositions and Infringements*

The claim by Franz Volkl against Goudie's use of Greek Alphabet Trade Marks for sports goods in West Germany has been settled at a level satisfactory to Goudie.

14.4 *Trade Marks to be Abandoned*

a) "Portapress" by Hi-Flex in West Germany.

b) "Girspan" in U.K. by Greengate and Irwell.

c) "Pirflex" in U.K. by Greengate and Irwell.

d) "Mattamac", "Niplas" and "Britto" in U.K. by Greengate and Irwell.

15.0 *Miscellaneous*

15.1 Advice has been given to Lonstroff-BTR on facilities for testing of rubber for air and water vapour permeability.

15.2 Bioquest, on behalf of WIRA, approached Central Development enquiring whether BTR would be interested to make and market an instrument that can measure the microbiological cleanliness of surfaces. Its advantage over other instruments are simplicity of use and speed of operation. The enquiry has been put to BTR Safety Ltd., Leyland and Birmingham.

15.3 Help has been given to BTR Hargill, Singapore, to introduce them to U.K. manufacturers of steam turbine plant for a power station contract that BTR Hargill may be tendering for. Serck Heat Transfer may also participate in the project.

15.4 Samples of rubber have been analysed for BTR Silvertown by pyrolysis IR analysis.

15.5 12 epoxy formers have been made and supplied to BTR Silvertown, Precision Mouldings.

15.6 25 kgs of Silverlease were despatched to Wailes Dove for use in S.41 to be used by BTR Silvertown, Pipeline Services.

G. W. Keeling

DISTRIBUTION:-

Mr. Owen Green
Mr. J. C. Cahill
Mr. P. Fatharly
Mr. L. J. Stammers
Mr. D. Johnston
Mr. L. Dean
Mr. A. Jackson
Mr. J. D. M. Smith
Mr. C. J. Stearnes
Mr. J. M. Kent

PLAINTIFFS' EXHIBIT 331

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

December 22, 1981

Mr. Hamish Cameron
BTR Silvertown Limited
Horninglow Road
Burton-on-Trent
Staffs DE13 OSN
ENGLAND

Dear Hamish:

I came away from the meeting last Thursday, December 17th, observing that all attendees felt there was a "good feeling" in regard to the discussion of Sorbothane. I also felt there was an attitude, of acting as a family striving to obtain the ultimate values of Sorbothane, for the benefit of BTR Incorporated and BTR Limited.

I will review and communicate by this letter some of the important items that were discussed:

1. H. Cameron will pursue with NRDC to obtain exclusive license for Hamilton Kent to manufacture and sell Sorbothane products in U.S.A. If royalty is questioned by NRDC, H. Cameron and Hamilton Kent will negotiate such royalty with NRDC.

2. H. Cameron, when and if Japanese agreement is returned signed or unsigned, he will not sign such agreement and will inform Japanese company that BTR has decided against such agreement (Hamish we have to be careful Japanese company doesn't approach NRDC directly). If they do then BTR Ltd. or Hamilton Kent should take steps to manufacture and sell in Japan via a BTR subsidiary in Japan.

3. M. Hiles will review Lite patent and will attempt with Hamilton Kent's legal counsel to prove that Lite patent is not worth the paper it is written on or to prove that it can be circumvented.

4. M. Hiles will communicate with Robert James Seamarks to prevent him from being a thorn in our side in regard to Hiles patent.

5. M. Hiles will send copy of document to H. Cameron, B. Crowther, and D. Sharrock to prove Hiles has assigned patents to Hamilton Kent.

6. Per Brian's request Phase II will not be under U.K. hospital facilities if it could result in NRDC obtaining rights to the medical data resulting from Phase II study.

7. Brian will send copies of invoices of product Tebbett & Hall purchased from Permali. A good possibility Permali was aware of M. Hiles patent before they sold to Tebbett & Hall.

8. M. Hiles will ask our legal counsel to obtain a file wrapper in regard to Lite patent application in U.S.A.

9. This was not discussed, but I am recommending H. Cameron re-write royalty agreement so that Hamilton Kent and BTR Leyland are paying to BTR Ltd. the same percents (I understand there was no royalty agreement between BTR Ltd. and Permali). Such agreement should be effective for both parties January 1, 1981.

   Such agreement should state percent BTR must pay to NRDC separately and percent Hamilton Kent and BTR Leyland should pay to BTR Development for further development of Sorbothane.

   This agreement should be signed by the three parties involved (maybe Brian might want to add to this recommendation).

In the same light, if Hamilton Kent develops a new or improved Sorbothane, such will be available to BTR Development and BTR Leyland at a negotiated price.

All production expertise will be exchanged by all parties involved at no cost.

All comments and suggestions should be communicated and discussed by the three parties involved. D. Sharrock should be involved to make sure our agreement at this point is equitable to all parties.

If I have left out any points or subjects that should be noted, please submit your communique as an addition to this report.

1982 and beyond should be fantastic for Sorbothane Sales. Thanks for a very pleasant meeting. I feel we overcame many hurdles.

Sincerely yours,

HAMILTON KENT MFG. CO., INC.
Kenneth M. Leighton
President

KML:el

cc: John C. Cahill
Brian Crowther
David Sharrock

PLAINTIFFS' EXHIBIT 333

SORBO
Sorbo Incorporated

Innovations in Advanced Polymer Technology

August 30, 1982

MISSION ELECTRONICS
310 Carlingview Dr.
Rexdale, Ontario
CANDA M9W5G1

ATTENTION: Nicholas Heckford, V.P. Finance

Mr. Heckford,

I have read your letters to Ms. Heinsohn and to Dennis Pijor and I will state to you our terms:

1) They are Net 30 days.

2) There is an interest charge of 2% of balance over thirty (30) days.

3) We have, in addition to Net 30 days, a total amount of $15,000 maximum credit at any one time.

I wold like to give you some facts that obviously you have misstated.

1) Mission did not bow to pressure from Sorbo, Inc.

   a) Mission was not able to obtain an acceptable designed product from the U.K..

   b) Maurice Hiles, the inventor, was employed by Hamilton-Kent (now Sorbo, Inc.) and the only location Mission could obtain acceptable product was from the U.S. and only by using the expertise of Maurice Hiles.

If you so desire to have the U.K. supply your needs, I have no objection to that procedure.

2) The common or customary terms in the U.K. may be 90 days, but we in the U.S. have our own common and customary terms and they are Net 30 days.

3) We don't find any advantages at all in complying with your request to extend your credit to 90 days.

Per the policy as I have stated above, we would appreciate it if you would bring your account up to date to agree with Sorbo's policy.

SORBO, INC.
/s/ K. M. LEIGHTON
K. M. Leighton, President

KML/pp

cc: L. Heinsohn
Dennis Pijor
Henry Azima

PLAINTIFFS' EXHIBIT 359

"CONFIDENTIAL-COUNSEL AND EXPERTS ONLY"

NOTES OF MEETING WITH K. M. LEIGHTON
New York Apartment—E. 54th Street
Tuesday AM, June 7, 1983

We reviewed in some detail the activities of Maurice Hiles in respect of the contact he has had with the Goodyear Company and the latest incident when he was in conference with two members of the Goodyear Company, one allegedly the sales manager of the Wingfoot insole plant in Vermont, on Friday, June 3, at IEM's office.

At this writing we don't know how serious this situation is. It could well be that Maurice Hiles was meeting with the Goodyear people to discuss Sarathon, but in any event, we have established in Ken's mind that we have got the gypsy's warning from Maurice that our own success will sow the seeds of our own destruction. Ken readily agreed with my reading of the situation and also agreed that we should accelerate the pace of activity in Sorbo to work the seam to the utmost before it was degraded by the competition.

I told Ken that in view of his commitments as a manufacturing manager and being responsible for the equine, athletic, medical and military markets of Sorbo, that I was going to start a company which would be independent of Sorbo to take our product into the mass markets, into the consumer markets. Ken was clearly surprised by what I said, and we discussed it over the next 30 or 40 minutes spasmodically. I believe that I have his support for this venture. He sees the logic in

what we are doing and apparently has no objection to the company being wholly owned by BTR and its destiny controlled by them.

Ken asked me if I would consider putting Chris Risley in to run the business. I told him that I could see Chris having a value to the enterprise for perhaps the first year. Ken responded by saying that if this was the case, then we should get a backup man in fairly quickly. I concurred and said that probably the backup man would be Ken Leighton's successor. We would put him into the new company rather than into Sorbo.

This met with Ken's immediate support. Ken cannot visualize having a subordinate working the confined space of Twinsburg. This would answer our problem and be quite acceptable to Ken.

I asked Ken to consider expanding the manufacturing facility. I don't think we are going to have the capacity to meet the level of demand we can generate from existing outlets and new outlets.

Ken will immediately contact his landlords to ascertain the timeframe and cost of building, say, a 20,000-25,000 foot facility in the Twinsburg area. There is a building on the park which is for sale which is too big at 30,000 foot plus. Ken will inquire whether or not this would be available for lease.

We need to move swiftly. I will contact Chris Risley and set up a meeting with him on Monday next in order that we can map out our game plan and move into our new enterprise as soon as possible.

J. C. Cahill

JCC/bt
6/8/83

cc: K. M. Leighton

PLAINTIFFS' EXHIBIT 360

HAMILTON KENT MFG. CO., INC. &
BTR DEVELOPMENT SERVICES, LTD.

SORBOTHANE AGREEMENT

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

A. Hamilton Kent is granted an exclusive license to manufacture and sell Sorbothane products in the U.S.A. for three years and first option to renew for another three years as long as review indicates markets are being covered to the satisfaction of Hamilton Kent and BTR Development Services, Ltd. Burton-on-Trent. Hamilton Kent has the right to sell Sorbothane products in all world markets. If Hamilton Kent manufactures Sorbothane products in other world locations, terms more favorable than stated in (B) will be negotiated.

B. Hamilton Kent agrees to pay BTR Development Services Ltd., Burton-on-Trent a royalty of 3% on all sales of products produced with Sorbothane up to a sales value of $1,000,000 per annum and 3% thereafter on all additional sales as long as U.S.A. Sorbothane patent is protected.

C. A monthly report will be prepared by BTR Development Services, Ltd., Burton-on-Trent incorporating all new knowledge from all sources including Maurice Hiles. Hamilton Kent will operate in a similar manner so that there is complete reciprocity of new ideas, prints, technical information, samples, etc.

D. Royalties will be forwarded to BTR Development Services Ltd., Burton-on-Trent no later than Marth 15 of the following year of reporting sales.

Date July 24, 1980

HAMILTON KENT MFG. CO., INC.
/s/ KENNETH M. LEIGHTON
Kenneth M. Leighton, President

Date August 20, 1980

BTR DEVELOPMENT SERVICES, LTD.
/s/ J. B. LEASON

PLAINTIFFS' EXHIBIT 375

Sent 10/1
12:15 pm
Pat

File

ITT GA 85167126+
SORBO INC TWBG

"CONFIDENTIAL-COUNSEL AND EXPERTS ONLY"

10 01 1214
67126 LBRLEY G
GA
TWINSBURG, OH 10182
ATTN BRIAN CROWTHER

FRELEN U.S. HAS BEEN IN CONTACT WITH US CONCERNING SORBOTHANE. IT IS THEIR DESIRE TO MARKET A FRELEN/SORBOTHANE COMBINATION FOOTBED TO THE U.S. AFTERMARKET. WE HAVE LEARNED THAT LEYLAND HAS INFORMED FRELEN U.S. THAT THEY WOULD SUPPLY THESE PARTS. THIS INFO WAS GAINED BY A LETTER TO FRELEN WRITTEN BY C. WILLIAMS, WHICH WAS READ TO US.

THE IMPORT OF FINISHED SORBO PARTS TO A U.S. CUSTOMER IS IN DIRECT OPPOSITION TO A HARMONIOUS MARKETING RELATIONSHIP BETWEEN OUR TWO COMPANIES.

PLEASE EXPLAIN YOUR POSITION.

REGARDS

L. HEINSOHN

SORBO INC TWBG
610 427 9201
67126 LBRLEY G. . . . .
1216EST 002.00

PLAINTIFFS' EXHIBIT 376

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

SORBO INC TWBG

TX 67126 LBRLEY G No. 6310 DATE 05 OCT 1982

ATTN L. HEINSON

RE YOUR TLX 10.1.82. LETTER FROM COLIN WILLIAMS WAS TO FRELEN U.K. AND NOT FRELEN U.S. IT DID HOWEVER INDICATE THAT FRELEN U.K. COULD SHIP FOOTBEDS TO THEIR U.S. ASSOCIATES.

THIS LETTER WAS SENT WITHOUT MY KNOWLEDGE AND I HAVE SINCE ADVISED THAT WE SHOULD DO EVERYTHING POSSIBLE TO PREVENT SORBOTHANE BEING SHIPPED INTO THE U.S. IN THE FORM OF FOOTWEAR COMPONENTS. CW HAS BEEN INSTRUCTED TO INFORM FRELEN THAT SHIPMENT OF THE FOOTBEDS TO THE U.S. WILL NOT BE POSSIBLE.

APOLOGIES FOR ANY PROBLEMS WHICH THIS MAY HAVE CAUSED YOU. PLEASE ADVISE IF YOU FEEL WE ARE GUILTY OF ANY FURTHER INFRINGEMENTS AT ANY TIME.

REGARDS

BRIAN CROWTHER

67126 LBRLEY G

SORBO INC TWBG

PLAINTIFFS' EXHIBIT 399

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

I would welcome any degree of cooperation that is designed to increase our awareness of Sorbothane and its market potential.

A sound working relationship has already developed between this corporation and L&B and I am quite sure this will be extended to Empire Rubber.* The weakness appears to be a communication breakdown between Central Development and companies outside the United Kingdom and it would obviously be an advantage to rectify this.

The physical properties of a visco-elastic polymer fall into two categories, those that describe the static condition and those that are related to performance. The former are easy to compile and we believe our data to be comprehensive. There is an ongoing programme of updating as we are continually 'fine tuning' Sorbothane to improve its basic properties. The raw materials obtainable in the United States are also different and as we have a much closer working relationship with Bostik US we have been able to improve the formulation and the overall performance. These developments may not necessarily be relevant in the UK.

The dynamic properties are a different problem. Whilst we were still probing the industrial market each physical requirement was dealt with individually and evaluated on a one time experimental basis. However this type of evaluation does not meet the necessity for performance predictability. In our minds there is only one answer and that is to compile a computer programme. This Maurice is at present undertaking at

* Several of the product lines now being sold in UK were designed and developed here.

Akron University and a copy of his proposal and rational is attached. Obviously we would be prepared to share this information and you may like to suggest means by which we might be reimbursed.

Market cooperation is possible and probably helpful, but where there is a difference in objectives who makes the decision. Take, for example, our recent negotiations with Nike. Fortunately these are complete and we do accept that although they are the largest sports shoe manufacturer in the world this is no consolation to L&B. Instances of exclusivity in prescribed fields can also present difficulties. Price equalization may or may not be possible—or even desirable. Raw materials and labour vary considerably from US to UK. We could not, for example, compete with UK in the cost of a pair of heel inserts and I am sure in many other products.

In the United States new uses are suggested, evaluated and implemented weekly and this is probably so in UK. An exchange of this sort of information would be really valuable.

Please be assured of our total cooperation. I note the increase in royalty rate, it would be nice to see something for it.

Finally I would advise you that in our marketing and production programme we are projecting well into 1984 and if there is to be some policy change in the formulation and the performance of Sorbothane we really need to know now and not the latter end of 1983.

You are very welcome to visit us in May and if you will advise me of your specific requirements I will be glad to make the arrangements.

Sincerely,

KML

PLAINTIFFS' EXHIBIT 402

SORBO
SORBO INCORPORATED

Innovations in Advanced Polymer Technology

October 22, 1982

BTR, INC.
One Hospital Trust Tower
Providence, RI 02906

ATTENTION: Mr. John Cahill

Dear Mr. Cahill,

A few months ago, Dan Kaplan stated to me, "Do you really want an exclusive with Nike? Wouldn't you be better off selling to all athletic shoe manufacturers?" Everyday I meditate. I re-think and think again, "Is an exclusive with Nike the best for Sorbo, Inc.?"

We continue to receive calls daily from Converse, New Balance, Brooks, Bata, etc. (Competitors of Nike) wondering if we have changed our mind and whether we are ready to sell them Sorbothane.

I now feel that Sorbo, Inc. can't really afford to put our eggs in one basket as there appears to be so much demand and need for Sorbothane in athletic shoes—we should not limit its use.

I would appreciate it if you will discuss with Dan and arrive at some language that will give Nike most of what they want without limiting Sorbo, Inc. When we agree to some language, it would be appropriate for Dan to explain to Rich that it is impossible to give exclusives due to (many reasons).

Sincerely,

SORBO, INC.
/s/ K. M. LEIGHTON
K. M. Leighton

KML/pp

cc: Dan Kaplan

1670 Enterprise Pkwy., Twinsburg, Ohio 44087/
In Ohio (216) 425-7151 Toll Free 800-321-0171/
TELEX 810-427-9201—CALL BACK SORBO INC TWBE

PLAINTIFFS' EXHIBIT 403

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

Distribution: KML, TJP, D.Pijor, AGL, JTG

NOTES OF MEETING WITH K. M. LEIGHTON
Thursday, June 10, 1982—Twinsburg, Ohio

1. *Nike Agreement:* I told Ken that because we don't hold an exclusive license in the United States, it is impossible for us in sincerity to enter into anything like the type of agreement that Nike would like us to contemplate. Ken understands this situation fully.

   I have agreed to have a letter drafted which Ken will write to Nike expressing our regret in not being able to comply with their request and containing a sop in the form of a comfort paragraph indicating Sorbo's willingness not to knowingly sell Nike-type products to third parties in North America with whom Nike competes.

   Dan Kaplan will draft this and send it over to Leighton in due course.

2. *Credit Control—IEM:* Because of IEM's substance in US, UK and Switzerland, it would be quite imprudent of us to extend credit terms beyond those presently operative of $20,000 on 30 days. We discussed the proposition that we offer IEM a 2% discount for cash with order. This is a good deal for IEM and considerably lessens Sorbo's exposure. I would endorse this policy if Ken Leighton decided to pursue it.

3. *Distributor Agreement:* Ken handed me a distributor agreement he would like to conclude with Ohio Cushions, IEM and any other distributors of Sorbo products.

   I have passed this to Dan Kaplan and asked him for his comments. I will pass this agreement back to KML in due course. KML will take no further action on this matter until he hears from me.

4. *Pricing Policy:* We agreed to raise prices of Sorbo products across the board within 30 days. Joe Gentile, Dennis Pijor and KML will work out details of the increase which will enable Sorbo to reach a PBT of 40% before the end of 1982.

   We have a super product here. Let's milk it NOW.

5. *Computer:* We discussed the advisability of putting in a mini now. The desirable choice would appear to be IBM, providing it can take the software packages which are appropriate to Sorbo's immediate needs.

   Dennis Pijor and KML will discuss this matter and come up with a recommendation within 21 days.

6. *Sorbo Agreements:* Because the Board meeting could not be held this day, we will sign the minutes with a unanimous written consent.

   Amendments will be made to the Sorbo agreement which will be Federal Expressed to Ken Leighton and can be signed by him and Tom Petrosewicz at his discretion.

   A new share certificate showing SW Delaware as the stockholder of Sorbo will be sent to KML. Please sign this, Ken, and send it back to me and I will sign it and return it to the corporate files.

/s/ JC
J. C. Cahill

JCC/bt
6/11/82

PLAINTIFFS' EXHIBIT 404

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

NOTES OF MEETING WITH K.M. LEIGHTON
at Twinsburg, Ohio—Thursday, 8/5/82

1. *Nike Agreement*

Ken is still being bugged by Nike for a more binding agreement.

There is really nothing further we can commit to than is contained in the letter which Ken wrote to Nike dated June 1982 (drafted by Dan Kaplan).

I suggested that Ken meet with the Nike manager, break bread with him, and explain that as far as Sorbo is concerned, they will not knowingly sell to a competitor of Nike in the United States. Provide the background information of the NRDC license and their caveat concerning a second licensee in the United States, and assure Nike that we will use our best endeavors to honor the spirit of the agreement.

Ken has agreed to do this.

2. *Credit Control—IEM*

Ken would like to give IEM more credit. Their track record to date has been good in terms of payment.

I have told Ken that I would like to hold IEM at $20,000 on thirty days for the time being. Let's give it a little longer before we loosen up on this arrangement.

3. *Distributor Agreement*

I handed Ken the distributor agreement drafted by Stephen Howard.

Item (4) of his memo to me dated August 3 refers.

It looks simple and straightforward. It has been plagiarized from the Worcester distributor agreement.

I am quite relaxed about Ken using it with his distributors in the United States.

4. *Pricing Policy*

A price increase was put through in June which hit the P&L account in July. 50¢ on soles, taking the price from $3.50 to $4.00. 25¢ on heels, taking that price from $2.50 to $2.75.

The market seems to have digested this without trouble (no need for Digel yet).

5. *Computer*

No action has been taken on this matter.

I have asked Ken to arrange for an Apple demonstration the next time I go to Twinsburg in order that we can make a speedy decision in this area.

Without question, a small personal computer will greatly assist Sorbo in tracking their costs, receivables and payables in an effortless manner.

We should not wait until Dennis is available—that day will never come because he has more pressing matters on his mind to attend to.

6. *Intermark*

Ken has asked if he can write a letter to Intermark along the lines of the Sorbo letter.

I will touch base with Dan Kaplan on August 9 and let him know.

7. *Consultancy Agreement with Maurice Hiles*

The draft presented by Stephen Howard does not address two important matters contained in the aide-memoire:

a) we need to authorize all time commitments by Maurice Hiles before the event; and

b) we need to know precisely who owns the patentable know-how which is derived

   — from the work we specifically ask Maurice to carry out on our behalf, and

   — any work which he carries out on his own behalf which results in patentable material in connection with Sorbothane.

I will discuss this matter with Dan also on Monday and aske him to redraft the agreement accordingly.

8. *Sorbothane Accounting Responsibility*

Ken feels that there is duplication between Twinsburg and Kent on some aspects of the accounting function.

I have told Ken that I wish to see the accounting function responsibility remain at Kent. I am concerned about any duplication which is taking place.

If we install a personal computer at Twinsburg, it can track receivables and payables with no problem and provide Ken with the working capital controls he needs. He is already doing the invoicing. He knows his cost of sales from his standards which can be built into the personal computer. He knows his payables because he approves them prior to their being sent to Kent for payment. Provided Kent give him a TWX every Friday telling him what they have physically paid, he knows his book and cash payable position. Inventories can be easily calculated from the data base which Ken already has.

I will ask Joe Gentile to spend a little time with Ken and Dennis next week to insure that no further duplication takes place. We have quite enough to do without doing work twice.

One matter that I did ask Ken to consider carefully is that he doesn't create duplication by having a dual accounting system as he did at Kent.

We must learn to live with the schedules BTR uses, particularly the MR. We all track off of these. They are what BTR uses to monitor the performance of their divisions around the world.

I have asked Ken to use this accounting package rather than one that he develops himself. To have two accounting systems will only cause confusion and frustration and, I believe, will be time-consuming.

We have a meeting scheduled for September in Twinsburg.

9. *General*

The company appears to be making good progress and should easily outperform the current profit plan for 1983, which perhaps should be increased in light of current market demand and the available capacity at Twinsburg.

J. C. CAHILL

JCC/bt
8/6/82

cc: K. M. Leighton
D. D. Pijor
J. T. Gentile
A. G. Lee

PLAINTIFFS' EXHIBIT 407

LOGO

310 Carlingview Drive, Rexdale, Ontario M9W 5G1 Canada
Telephone (416) 675-7730
Telex: 06989166

AUG 27 1982

NH/ldc

Ms. Laurene Heinsohn,
Marketing Manager,
Sorbo Incorporated,
1670 Enterprise Pkwy,
Twinsburg,
Ohio 44087.

Dear Ms. Heinsohn,

As discussed, I enclose a copy of the letter which I sent to your Mr. Pijor (whose name I am afraid I mispelt (mispelled)).

Perhaps we can discuss this matter in September. When you are considering this matter, I would ask you to particularly bear in mind the fact that we have bowed to great pressure from your Company to sever our ties with BTR in the U.K. and to purchase from you our total Sorbothane requirements for worldwide sales.

Yours sincerely,

(ILLEGIBLE)
NICHOLAS HECKFORD
V.P. FINANCE

Dictated by NH and signed in his absence

England Huntingdon Cambridgeshire
PE i8 6B0 ENGLAND

PLAINTIFFS' EXHIBIT 409

"CONFIDENTIAL"

ITT GA 85167126+

SORBO INC TWBG

10 21 1037

67126 LBRLEY G

GA

TWINSBURG, OH 10-21-82

ATTN BRIAN CROWTHERS

PLEASE DON'T GET INVOLVED WITH NIKE.
OUR PROCEDURE IS SORBO WILL DISCUSS AND FINALIZE PRODUCT DESIGN AND PRICE.
IF IT DOESN'T HAPPEN THIS WAY DESIGNS CAN BE OF ALL VARIETIES AND PRICE CAN GET OUT OF HAND.
AFTER WE HAVE CONCLUDED ALL ASPECTS WITH NIKE THEN IF IT MAKES SENSE TO PRODUCE IN U.K. INSTEAD OF U.S. WE WILL INFORM NIKE TO DO SO.

REGARDS

K M LEIGHTON
SORBO INC TWBG
810 427 9201
67126 LBRLEY G. . . . .
1039EDT 001.60

PLAINTIFFS' EXHIBIT 410

SORBO

SORBO INCORPORATED

Innovations in Advanced Polymer Technology

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

November 10, 1982

NIKE, INC.
3900 S. W. Merry Blvd.
Beaverton, OR 97005

ATTENTION: Mr. Richard Werschkul, Esq.
RE: YOUR LETTER DATED OCTOBER 14, 1982
*** THIS IS A CONFIRMATION OF 11-10-82 TELEX***

ITEM (1) Paragraph 1B

Sorbo, Inc. is a Delaware Co. and the Incorporation papers state Sorbo, Inc. and its successor and assigns, therefore, all agreements need to read the same as Incorporation papers.

Paragraph 1E, 3E, 3D

British Technology Group (BTG) owns the Sorbothane patent and at this point in time they have assigned the patent to BTR in E.E.C. countries, Australia and United States. BTG *could* assign the patent to someone else in the United States, however, they have orally stated they wouldn't assign patent to anyone else in United States.

Sorbo, Inc. can agree to produce in the United States athletic shoe Sorbothane units to Nike only. Sorbo, Inc. cannot control the BTR, U.K. company that produces Sorbothane nor BTG on its assignment of the

Sorbothane patent. It is possible for BTR (U.K.) to sell to competitor of Nike and with Sorbothane trademark being somewhat controlled by BTR (U.K.) also license or allow competitor of Nike's to use the trademark. Sorbo, Inc. will attempt to control Nike's competitors from using the trademark in the United States and we believe this is possible. Nike will have exclusive use of Sorbothane trademark in the United States pertaining to athletic shoes as stated in 1D. Nike can use trademark Sorbothane in other countries with no conflicting problems. We can attempt to be exclusive but cannot guarantee such.

Paragraph 1D and 4A

Are somewhat in conflict. The example of hiking boots is not a good example as hiking boots are mentioned in 1D and you agreed to allow a competitor to manufacture hiking boot with Sorbothane even though you mentioned it in 1D.

We don't feel in 4A we should be obligated to protect Nike on models of footwear that have not yet been defined: When and if you define a model of footwear and state time when it is expected to be in production, we can then inform you that we can include the item in 1D or we can inform you that model of footwear is already being manufactured by another shoe manufacturer with Sorbothane.

Paragraph 15

I am enclosing conditions of sale.

All other items per your letter of October 14, 1982 I have requested Dan Kaplan of Adler, Pollock and Sheehan to answer those as soon as possible.

Will keep you informed.

The above explanations related to your questions in your letter of October 14, 1982 are not to be interpreted as legal answers but only a layman's explanation so that you can better understand our position as stated in our latest agreement.

Regards,

SORBO, INC.
/s/ KML
Kenneth M. Leighton, President

KML/pp

Enc: Conditions of sale

CC: Dan Kaplan—Adler, Pollock and Sheehan
John Cahill—BTR, Inc.

1670 Enterprise Pkwy Twinsburg, Ohio 44087/
In Ohio (216) 425-7151 Toll Free 800-321-0171/
TELEX 810-427-9201—CALL BACK SORBO INC TWBE

PLAINTIFFS' EXHIBIT 411

SORBO

SORBO INCORPORATED

December 6, 1982

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

BTR SILVERTOWN LTD.
Horninglow Road
Burton-on-Trent
Staffs DE13 OSN
ENGLAND

ATTENTION: Mr. George Keeling

Dear Mr. Keeling,

1) We are working with Nike R & D Department to see if they have any more information to pass on to us in regard to "Prior Art" vs. Light-McLellan patent. Our legal counsel feel strongly that information we have supplied to you would be sufficient to void the L & M patent at least in the United States. Therefore, we could take this step first.

2) In regard to anti trust U.S.A. vs. exclusivity U.S.A.. Our legal counsel is going to write a brief which I will forward to you to prove to BTG that their fears related to United States antitrust is unfounded and is a false assumption of BTG's.

3) In regard to sharing new Sorbothane with BTG:

   a) First, I think we would have to compare the value of new Sorbothane vs. old Sorbothane. I would say if it is much better (new vs. old), then it would be quite difficult to decide whether to share our good fortune with BTG or not to share it with them.

   b) Second, I think we have to analyze all the things that could happen if we didn't share or if we did share and from this analysis attempt to determine what is the best solution.

   c) My first "off-the-cuff" reaction would be to keep the new Sorbothane to ourselves and continue to pay royalties to BTG as if nothing has changed. Believe me, this opinion is not etched in stone. You will have to keep me up-to-date so I can give you some more thoughts if some of the rules change in the next couple of weeks.

4) In discussion with I.E.M., they claim they are not filing any patents related to Sorbothane. I.E.M. is in a position where they don't want to do anything to jeopardize their position with L & B or Sorbo, Inc.

5) I understand Bieber has been convinced to assign the Sorbothane trademark over to BTR in regard to the following countries:

   Switzerland, France, Germany, Austria, Italy.

6) I have no objection to item #2 on the last page of your notes.

   a) Even though we may not reveal C.D. patent information to them.

   b) Also, only if a like material does not appear on the market. Unless BTG can claim infringement.

7) Item #3 last page:

   Our sales could be easily $3 to $5 million in 1983, so you should structure your royalty terms with BTG on the basis that L & B and Sorbo, Inc. sales are

going to be quite significant and BTG's royalty income is going to be quite exciting to them and also unexpected (I would assume).

The last paragraph I don't quite understand, but with the increased sales in future years, Central Development income will increase drastically if left at the same percentage as it presently is at. I feel C.D. will reap sufficient benefits from additional sales.

8) Additional commentary in regard to R & D. We need much information in regard to absorption of noise and vibration related to thousands of industrial uses.

At the moment, I wouldn't even know how to approach such problems. We have hundreds of inquiries industrially, but very little factual information that we can relate to them. Any ideas or thoughts would be appreciated.

I hope my comments are useful.

Regards,
SORBO, INC.
/s/ KML
K. M. Leighton, President

KML/pp

cc: B. Crowthers—L & B
J. Cahill—BTR—Prov.

PLAINTIFFS' EXHIBIT 412

KML-4-82

"CONFIDENTIAL-COUNSEL AND EXPERTS ONLY"

NOTES OF MEETING WITH K.M. LEIGHTON
at Sorbo, Inc.—Tuesday, December 7, 1982

1. Ken Leighton gave me a balance sheet (Exhibit I) which shows a bundle of cash. His question is, what do we do with it?

I had discussions with Joe Gentile about this matter two months ago. We must address it and have a reply for KML when he visits Providence on December 17.

2. *IEM*

Dennis Pijor wrote to Bert Lee approximately two weeks ago concerning extending IEM's credit limit.

I have not seen this correspondence. We need to discuss it and have a response for Ken Leighton in time for his 12/17 visit to Providence.

3. *Maurice Hiles*

Ken Leighton has a new and imaginative proposal concerning Maurice Hiles. He intends to discuss this before his meeting with Dan Kaplan in order that we can have a full and frank discussion on 12/17.

4. *Computer*

KML would like to install a Commodore 64 computer at Twinsburg. I have no objection to this, providing it meets our technical criteria and that if Kent introduce a micro-mini it is of the same design, not necessarily the same model number.

Ken will raise a CER and let me have it for approval.

5. *The Marketplace*

The company has prospered very well since its inception in May of 1982. It is a highly profitable business and appears to be throwing off a ton of cash.

It is still basically a footwear business. Ken is taking it out of this arena. The horsepad market could develop into a very profitable, repetitive business. The models for Ideal could significantly broaden the base of the business and take us into new marketplaces.

We must be aware that our success will breed competitors. We must keep our antennas out and make sure that we are aware as soon as possible of any competitive movement in the marketplace in order that we can stifle it by threatening to take legal action because of infringement of our patent.

The company is still small, it's simply run, it's dynamic, we know exactly where we are, the inventory is in good shape, and so are the receivables.

LET'S PLEASE KEEP IT THAT WAY.

We are looking forward to Ken's visit on December 17. He will independently brief Dan Kaplan on the matters that he wants to discuss. I have agreed to make myself available during that day, and I would ask Joe Gentile and Bert Lee to do likewise.

John C. Cahill

JCC/bt
12/8/82

Distribution: K. M. Leighton
T. J. Petrosewicz
D. D. Pijor
J. T. Gentile
A. G. Lee

PLAINTIFFS' EXHIBIT 414

INTERMEMO

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

TO: KEN LEIGHTON

FROM: G W KEELING DATE: 28 February 1983

Sorbothane Licence Agreement with
British Technology Group (BTG)
U S A Exclusivity

The licence in US is non exclusive. We have requested that it should become exclusive.

Dr. K Hills, who handles the Sorbothane licence agreement in BTG, is sympathetic to our request and is not dissatisfied with BTR's performance but exclusivity requires a Board decision and there are the following points that are raising difficulties.

1) There has been a request from a small US company for a licence to manufacture Sorbothane. The company has sought to justify its application by saying that BTR through Sorbo Inc is not adequately meeting the market potential. They have said that Sorbo Inc is not able to meet the market potential because Sorbo will only trade through certain restrictive channels that it has defined to suit its own wishes. They have spoken of a potential market of $50 M pa through the drug stores. BTG have told me this but are not putting it to me as a complaint because they recognize that Sorbo Inc is on a rapidly rising sales record and this would be the wrong time to criticise their performance. BTG has no intention of granting a licence to this company but nevertheless the report does not help our request for exclusivity.

2) There has also been an application from a large US company for a licence to manufacture Sorbothane. This was described to me as being a very large company, a household name, and one that BTG could not disregard. I have not found the name yet but I strongly suspect that it is a household name because of its tyre products. It has made no accusations against BTR, simply applied for a licence and predicted that it could achieve very substantial sales levels. I have put our case forward very strongly that BTR has put in all the development and pioneering effort to bring Sorbothane to its present position and now that Sorbothane is clearly poised for commercial success other companies are eager to move in and steal a share of the benefit that must rightly belong to BTR. I believe BTG appreciate the point and will not wish to appoint any other licensees while BTR can continue to demonstrate a rapidly growing turnover in Sorbothane. Dr Hills said that his first response to this large company will be to advise them of the existence of the BTR licence and to ask whether the company is willing to have its name made known to BTR to consider whether BTR could supply its requirements. If the company continues to press for a licence, I have suggested that we consider the possibility of them becoming sub-licensees of BTR instead of having a direct licence from BTG.

3) The Light and MacLellan patent was again brought up, I continue to reject any suggestion that we should pay royalties on this patent. Only last week we presented further evidence (UK Patent No. 1239167 which was located by L & B) of prior art against this patent and I am hoping that they will finally accept that the patent is not valid.

In putting our application for exclusivity to his Board, Dr Hills has to provide a detailed justification. To strengthen the case I would like to give him as much of the following information as is commercially prudent.

a) Ownership of Sorbo Inc and its position in BTR structure.

b) The investment in Sorbo Inc—plant, equipment, market development.

c) Future investment intentions.

d) Sales predictions for next 3 years—by market sectors.

e) Number of employees.

f) Structure of the selling force—direct sales employees
—agents
—distributors.

Could you please let me have as much information as you are prepared to release on these points.

/s/ GEORGE KEELING
G W Keeling

CC: Mr. W. D. T. Tapley
Mr. J. Cahill

PLAINTIFFS' EXHIBIT 415

SORBO

SORBO INCORPORATED

Innovations in Advanced Polymer Technology

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

March 18, 1983

BTR SILVERTOWN LIMITED
Horninglow Rd.
Burton-on-Trent, Staffs
DE13 OSN ENGLAND

Attention: Mr. George Keeling

SUBJECT: QUESTIONS ON PAGE #2—Your Memo of 28 Feb. '83

George,

a) Sorbo, Inc. is a Delaware Corp. and is owned by BTR. It is controlled by the Western Division of BTR under the tutelage of John Cahill and headquarters office is located in Providence, RI.

b) When Sorbo, Inc. was incorporated it had an initial investment of $811,000.00.

c) If additional plant facilities and equipment are needed in the future, the situation will be analyzed using correct accounting and management tools and if solutions are positive, the facilities and equipment will be purchased upon approval of BTR, U.S. headquarters.

d) 1983 sales should approximate $3,000,000.00—
1984 " " " $5,000,000.00—
1985 " " " $8,000,000.00—

This includes athletic, medical, equine, industrial markets. These sales figures could be quite low as we are only now getting into a $500,000.00 annual advertising campaign.

It is possible in 1984 to have an advertising campaign between $750,000.00 and $800,000.00. Majority of advertising funds originates with distributors and supervised and approved by Sorbo, Inc.

e) Present number of employees: 23.

f) We have a combination of distributors and sales agents whichever suits the market the best. Distributors in many cases use direct salesmen and sales agents.

We have no direct sales employees mainly because in many cases new markets such as industrial are coming to Sorbo before we have had an opportunity to go to them.

Sincerely,

SORBO, INC.
K. M. Leighton, President

KML:pp

cc: J. Cahill

PLAINTIFFS' EXHIBIT 416

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

Sent 3/15
Pat

35134419+

SORBO INC TWBG

0019144 EST 1131 MAR/15/1983

34419 BTRETN GTWI
NSBURG OH 3-15-83

ATTN G. KEELING

RE+ ITEM 2 IN YOUR MEMO OF 25-2-83

THE LARGE COMPANY IS GOODYEAR. THEY NOW HAVE A RUBBER SOLE AND HEEL THEY ARE CLAIMING IS BETTER THAN SORBOTHANE. ALSO THEY COPIED OUR INSOLE AND HEEL DESIGN SO FROM A DISTANCE YOU COULDN'T TELL SORBOTHANE FROM GOODYEAR.

ALL THE WORK WE HAVE ACCOMPLISHED TO PIONEER THIS PRODUCT WHICH HAS TAKEN 2 YEARS IT WOULD BE, I FEEL, UNETHICAL TO BRING IN G A COMPETITION THAT COULD RIDE ON OUR COATTAILS AND START A PRICE WAR. WE DESIRE AT LEAST 5 YEARS (AS LONG AS WE SHOW CONSTANT IMPROVEMENT IN SOLES EACH YEAR I PREDICT BETWEEN NO AND 3 YEARS WE WILL BE BETWEEN 7 M AND 10 M SALES AND GROWING.)

I AM VERY DISTURBED AND CONCERNED BY BTG EVER THINKING ABOUT NOT GIVING US AN EXCLUSIVE AS LONG AS WE PERFORM. I AM

SO CONCERNED THAT I FEEL I SHOULD HAVE A MEETING WITH BTG TO DISCUSS OUR MARKETING ADVERTISING AND SELLING PROGRAM TO CONVINCE THEM OF STICKING WITH A WINNER.

YOUR COMMENTS WILL BE APPRECIATED.

REGARDS

K M LEIGHTON
SORBO INC TWBG
310 427 9201

34419 BTRBTN G. . . . .
003.2 MINS

PLAINTIFFS' EXHIBIT 421

BC/GK-1-83

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

NOTES OF MEETING WITH BRIAN CROWTHER AND GEORGE KEELING—Silvertown House
Thursday, April 7, 1983

Subject: *Sorbothane*

1. *Goodyear Wingfoot XL*

Ken Leighton's letter to me of March 23 refers.

Samples of Wingfoot have been obtained in the UK and tested. Our UK colleagues don't fully concur with Ken's opinion that the product is totally useless. They believe it does have merit. Whilst not possessing as good a set of properties as Sorbothane, it should be ranked by us as a potential competitor.

I have brought our UK colleagues up to speed on the action we are taking and have confirmed that we will keep them informed as this drama unfolds.

2. *License Agreement—Mitsui Nisso*

Brian Crowther is relaxed about granting Mitsui Nisso a license. We are under pressure to agree to a second licensee. We can take a dog in the manger position. This will not stand us in good stead with BTG; a factor we should recognize in the current situation vis-a-vis USA developments.

If we grant a license to Mitsui Nisso we can corral them in terms of the use of their own product plus the territories to which they are permitted to sell the licensed product. Brian is firm in believing in more control by granting a license than by refusing one.

Brian also makes the point that the granting of a license does not allow Mitsui Nisso to use the name of Sorbothane. It is a unique feature which BTR has over ALL of its competitors.

Having discussed the matter at some length with Brian and George, I share their view. That is to say, provided the agreement we sign contains the restrictions we deem desirable and they are not found too onerous by Mitsui Nisso, I would conclude a license agreement with this company, because it would appear to be in the interest of our company to do so.

3. *Maurice Hiles*

I explained the current position to George Keeling and Brian Crowther. Maurice Hiles is no longer on our payroll. He has become a consultant to us. We will send a copy of the consultancy agreement to George so that he knows the parameters within which we are working. Maurice can only work on Sorbothane with BTR or its appointed representatives.

I have asked George and Brian if they would involve Maurice in their development activities in the UK. Invite Maurice to meet with them and discuss matters of common interest. Assign Maurice development assignments which can be accomplished either in the UK or the United States. Bring Maurice onto the team. Make him feel part of the big picture.

Our colleagues in the UK are quite relaxed about involving Maurice. They will cooperate with us in this matter.

George Keeling has no plans to visit the United States in the near future—his budget won't allow it! I feel that he should come over and spend time with Ken, get to know our operation in the States and feel comfortable with it.

4. *Brian Crowther*

I was dealt a severe body blow during our meeting when I heard that Brian will be moving on from L&B to bigger and better opportunities with BTR. Whilst I am delighted to see Brian's progression inside our company, I am concerned that leaving Sorbothane at this time and severing the excellent relationship which he has developed with Ken Leighton will not be in the best interests of Sorbothane.

I hope that it might be possible for us to arrange for Brian to continue with his involvement with this product, whose success relies to a high degree on the marketing skills of the management in charge of its destiny. Brian has shown that he has great ability to stimulate new ideas for Sorbothane and his departure will be to the detriment of our enterprise.

5. *Marketing Opportunities*

Brian and I had only a short time in which to discuss the opportunities for Sorbothane. Brian's strategy is to develop bespoke products rather than standard lines.

He feels, and I agree, that a Goodyear can only make inroads against us, if we allow him to use the power of his name in promotion and distribution. If he can use his manufacturing expertise to manufacture high volumes of product at low cost.

If we go the bespoke route, the name Sorbothane becomes more important than the banner "Goodyear." Manufacturing large volumes of product has little relevance when one is "gap-filling" or serving special interests.

I will pass this information over to Chris Risley, who is about to embark on a marketing strategy for the US company. I think it very relevant and something we should not lose sight of.

Also, we should strongly promote the name Sorbothane in connection with anything we do in this area. The name should be on all products. It should be prominently displayed. Our mission in life should be to link the advantages of this material with the name Sorbothane so that the one becomes synonymous with the other.

John C. Cahill
/s/ J

JCC/bt
4/11/83

cc: L. J. Stammers
B. Crowther
G. Keeling
K.M. Leighton
C.A. Risley

PLAINTIFFS' EXHIBIT 424

CONFIDENTIAL

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

DEPARTMENTAL CORRESPONDENCE

Date May 2, 1983

Subject NOTES ON MEETING WITH DR. K. HILLS-BTG (April 28th, 1983)

To JOHN CAHILL Dep't BTR, INC.

From K. M. LEIGHTON Dep't SORBO, INC.

1) BTR being a British company will give top consideration in regard to any aspect of license.

2) Dr. Hills superior wasn't very cordial to Goodyear's request for license. When they were asked what was their market plan they said shoes. BTR's inner comment was that market was being covered. Also, BTG's inner comment was "Why did Goodyear wait two or more years before they approached BTG?".

3) BTG must go through motions in regard to any request for license to prevent severe criticism from U.K. Government.

4) BTG will probably make one of two decisions regarding exclusivity depending upon discussion with BTR.

   A) Lease status quo

      1) at this moment have no need to seek additional licensees for U.S.

   B) Or negotiate a new agreement with BTR which would probably involve additional royalties and a higher minimum royalty.

MY PERSONAL OPINION

The minimum royalty, even now, is not very high, therefore, an increase in that area wouldn't be any problem.

I feel a higher percentage of royalty also would be a better solution than inviting competition.

5) Some concerns of BTG:

   A) The possible threat of BTR coming out with their own material and leaving BTG in the lurch.

   B) The serious lack of communications between BTR and BTG.

      1) BTG has no idea of marketing plans, or any idea what BTR is doing in regard to utilizing the license to the fullest. I assume we aren't "blowing our horn" to convince them that we are acting in the best interest of BTG and deserve to have a license.

      2) BTG was concerned that BTR was not utilizing the Australia license and appeared not to be interested in utilizing the license, therefore, this was not in BTG's best interest.

6) A) This visit to Sorbo is the first time that Dr. Hills has had any communication of significance with BTR. He even felt before coming to the states that BTR wouldn't allow him to visit with Sorbo.

   B) BTG had no idea what Permali was doing to increase sales or develop markets and has no idea what or how L & B are doing with the product.

C) Dr. Hills is hoping that he will be allowed to converse with L & B to have an update on their progress.

D) The only indication they have had of what is going on is by the royalty payments they receive.

7) BTG has had no idea whether BTR is completely behind Sorbothane, whether BTR is committed to Sorbothane or whether BTR is even interested in investing money for such items as advertising, equipment and personnel to enhance the future of Sorbothane.

MY CONCLUSION AND OPINIONS

1) It appears that BTR can have an exclusive license in U.S. or a status quo (non-exclusive with a pretty good indication that BTG will not aggressively pursue another licensee for U.S.). It all depends pretty much on what BTR wants as BTR can probably get what they want by negotiating a new agreement.

2) Improved communications between BTR and BTG is of utmost importance and politically would improve BTR's position to retain unchallenged license arrangements.

3) BTR needs to convince BTG they are going to take Sorbothane seriously and give it its due in regard to investment.

4) There has been considerable concern about the Lite & McClellan patent (if you are not aware of what this is all about I will give you details later) and we now (I hope) have convinced BTG that proof of prior art deletes the clout it could have in the marketplace.

/s/ KENNETH M. LEIGHTON

PLAINTIFFS' EXHIBIT 425

PLEASE NOTE OUR
NEW NUMBER
(0283) 31155

cc. Mr. K. M. LEIGHTON

LOGO

BTR INDUSTRIES LIMITED

HORNINGLOW WORKS BURTON ON TRENT STAFFS TELEPHONE 0283 TELEX 34419 CABLES BRITGOODS BURTON ON TRENT

OUR REF GWK/LH

YOUR REF

DATE 14 June 1983

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

Dr. K. Hills,
British Technology Group,
101 Newington Causeway,
London SE1 6BU

Dear Ken,

We are delighted that you have been able to visit our Sorbothane production units at Sorbo Inc in U.S.A. and at Leyland and Birmingham in U.K. I feel sure that through this first hand experience you will have gained a much better appreciation of our commitment to the Sorbothane business and of the enthusiasm of the people concerned with it than I could ever have conveyed to you through descriptions of the work.

In this letter I will summarise where we now stand with Sorbothane and how we propose to push further ahead. This, together with what you saw and heard on your visits, will I hope provide the basis for your considerations with your Board and give justification for a decision in favour of making our Licence exclusive in each patented area for the life of the patent.

It is appropriate first to summarise the position in U.S.A. because this is where the dramatic growth is first showing through.

Sorbothane was taken up in U.S.A. by Hamilton Kent, a BTR company with experience in rubber processing. The exciting potential for the material in the U.S.A. market was quickly demonstrated by the Hamilton Kent management and in 1981 a new company, Sorbo Inc., was established to devote its efforts wholly to the development of the Sorbothane business.

An initial investment of $811,000 was made to set the company up in a new 7000ft² building and to purchase manufacturing equipment. The management effort and further on-going investment in marketing and in product development has brought rapid expansion with sales leaping to $1,830,000 in 1982 and predicted by Sorbo Inc to be approximately

$3,000,000 in 1983
$5,000,000 in 1984
$8,000,000 in 1985

These were made as realistic predictions. The first quarter of 1983 has already produced a figure that is ahead of budgeted rate and the indications are that there is now a good prospect that the predicted figures will be beaten in each of the years.

Looking beyond 1985 it can be confidently stated that a high rate of growth will be maintained for the foreseeable future.

A $500,000 p.a advertising campaign is now getting underway, it includes an approach to every footwear manufacturer in U.S.A. The advertising investment could rise to $800,000 in 1984.

The split of sales by market sectors is currently approximately -

Footwear	70%
Medical	17%
Equine	7%
Industrial	6%

For each market sector the selling organisation is set up in whichever way best suits that market.

Sales to footwear OEM's are handled direct by Sorbo Inc., otherwise for footwear and medical products there is a wide network of agents and distributors giving cover in some 42 countries and extending steadily. The sales potential for the footwear and for the medical markets is enormous. Sorbo has developed close links with the medical profession through consultancies.

Industrial sales are handled direct by Sorbo with sales already being made at least in prototype quantities to such diverse applications as delicate instruments, powered vibratory hand tools, vehicles, off-shore oil/gas rigs, seats for invalid chairs, pipe seals, and so on.

Two other market outlets are toys, where a substantial order has already been gained, and horse shoe pads, where orders are already rising promisingly.

The company now employs 32 people and the production unit operates on three shifts.

To meet the expansion, new production equipment costing $75,000 is on order for delivery in June 1983.

In the existing premises the turnover can be taken up to $6M p.a. and possibly considerable higher if it proves economic to invest in more automation. It is BTR's intention that finance will be available for the company

to move to larger premises when it becomes justified, suitable premises are readily available close to the present location.

In addition to the figures given above that are predicted by Sorbo Inc on the basis of the market sectors that they are at present serving there is a survey going ahead looking at whether we can get Sorbothane in to the drug store market economically. First reports are encouraging and could open up a market for sales of the order of $10M in the first year, $30M second year and peaking at $50M in the third year.

Turning now to the U.K., it was here that development first began and over about 7 years the cumulative effort and expenditure on development and on market trials has risen to a high level. The value of this pioneering work should not be underestimated. It was BTR's persistent support over this period that laid the foundation for the success that is now being achieved and it would be a gross injustice for any other company to be allowed a Licence now so that it could come in and reap some of the benefits that are rightly for BTR.

The breakthrough to the U.K. market came at the start of 1982 and the business was set up in Leyland and Birmingham.

Sales had been £48,000 in 1981, jumped to £184,000 in 1982 and predictions are:

£450,000 in 1983
£650,000 in 1984
£825,000 in 1985

The pattern of sales and of selling arrangements are similar to those already described above for Sorbo Inc.

To meet the rising production requirements an advanced robotics based system is to be installed during this year. The capital cost will be £85,000, revenue development costs will be £114,000. An application has been made to the Department of Industry for grant aid under the robotics section of the Product & Process Development Scheme.

BTR Kennon in Australia is now preparing to enter the market. Kennon will benefit initially because Sorbothane from U.K. and U.S.A. has already been sold in to Australia.

In Japan, Mitsui Nisso continues to be interested in becoming a sublicensee of BTR and we hope to conclude a Licence in the next couple of months.

Putting these predicted sales figures together gives:-

£'000's	*1982*	*1983*	*1984*	*1985*
Sorbo Inc	1080	2000	3333	5333
L & B	184	450	650	825
BTR Kennon		25	100	200
Japan		25	250	600
Sub-Total	1264	2500	4333	6958
+ possible drug store market		700	10000	24000
Total	1264	3200	14333	30958

In addition to the activities in the operating Divisions BTR has carried out and will continue with a programme of development on Sorbothane at the Central Development Laboratory. This will include development of the material and also of products, with the programme related to the market requirements expressed by the operating businesses. One thing that may result from the programme is a new material that would have similar characteristic properties but would be chemically different from the material covered by the BTG patent.

If BTG decides in favour of granting exclusivity for a long period we will discuss with BTG what provisions could be made to protect BTG's position if we did reach a marketing position with a new material.

Please let me know if you want any other information, we are keen to get a quick and favourable decision so that we can go full steam ahead with the planned investments.

Yours sincerely,

/s/ GEORGE KEELING
G. W. Keeling,
Director,
BTR DEVELOPMENT SERVICES LIMITED

PLAINTIFFS' EXHIBIT 429

cc J. Cahill

LOGO

BTR INDUSTRIES LIMITED

HORNINGLOW WORKS BURTON ON TRENT STAFFS TELEPHONE
0283 60611-61171
TELEX 34419 CABLES BRITGOODS BURTON ON TRENT

OUR REF	YOUR REF	DATE
JBC/LH	KML:jet	20 August 1980

"CONFIDENTIAL-COUNSEL AND
EXPERTS ONLY"

Mr. K. M. Leighton,
Hamilton Kent Manufacturing Co. Inc.,
2144 State Route 59,
P. O. Box 178,
Kent,
Ohio 44240,
U.S.A.

Dear Ken,

As I have been on holiday I am somewhat late in replying to your letters of July 24 (attached) and August 6, 1980 (see telex attached). However since both of these letters essentially deal with the same subject I shall reply to them together.

I return herewith a copy of our Sorbothane Agreement duly signed. As requested I have also sent a copy to John Cahill.

In paragraph A. of this agreement if has to be understood that BTR Development Services will not offer any other licenses to manufacture Sorbothane products in the U.S.A. for a period of 3 years. I have to put it in this manner because of the particular agreement which we have with N.R.D.C.

Quite simply our relationship with N.R.D.C. is that that the Corporation were not prepared to give BTR an exclusive license to Sorbothane for either the U.S.A. or Japan. N.R.D.C. had I believe some difficulties with the Law in the U.S.A. when they were licensing carbon fibres. This has made them completely neurotic and unwilling ever to give anyone an exclusive license in the U.S.A. However, we have a verbal agreement that they will not offer licenses to other parties in the U.S.A. and I have reason to believe that they will keep to this. We can but wait to see whether other pressures will make them do so. Frankly, I don't think they will particularly if Hamilton Kent is active in the field and giving them a good royalty return.

I therefore have to say that it is possible that N.R.D.C. could make a separate deal in the U.S.A. but I don't believe they will.

Wishing you good luck with the project.

Kind regards,

Yours sincerely,

/s/ HAMISH
J.B. Cameron

PLAINTIFFS' EXHIBIT 440

LOGO

HAMILTON KENT DIVISION OF: BTR INC.
Innovation in custom extruded and molded rubber
2144 State Route 59 P.O. Box 178 Kent, Ohio 44240
216/673-9555 800/321-2188 TWX 8104372330

MEDICAL
IEM

January 6, 1982

Dear Distributors:

We are in the process of establishing a Distributor in the U.S. to distribute Sorbothane products to the medical market both nationally and internationally. The product will be sold under a different brand name than Sorbothane. The brand name will be "Visco-Elastic". The word Sorbothane will be used in their descriptive information about the medical product.

Any business you now have related to the medical market you may continue to handle under the brand name of Sorbothane. You also may continue to pursue new business, nationally and internationally, related to the medical market using the brand name Sorbothane.

However, you might find some instances in the future of medical wholesale outlets competing with you for your medical business. I do not really feel this will be a problem because the brand name Sorbothane has had a considerable amount of national publicity.

Your geographical boundaries established for retail sport outlets is still in effect. Retail sport outlets will not be contacted by medical wholesale Distributors.

We expect our medical Distributor to become active approximately the first of March, 1982.

Sincerely,

HAMILTON KENT MFG. CO., INC.
/s/ LAURENE HEINSOHN
Laurene Heinsohn
Marketing Manager/Urethane

LH/ny

"Confidential (Illegible)

Hamilton Kent of Georgia 1581 Stone Ridge Drive, Stone Mountain, Georgia 30083 800/241-8580 404/938-5410

Hamilton Kent of Nevada 1650 Linda Way, Sparks, Nevada 89431 800/648-1266 702/359-7016

Hamilton Kent of Canada 77 Carlingview Drive, Rexdale, Ontario, Canada M9W 5E6 416/675-7822

PLAINTIFFS' EXHIBIT 478

NUTCO GA

79038618+

SORBO INC TWBG

8012280 EST 0821 MAY/25/1983

"CONFIDENTIAL-COUNSEL AND EXPERTS ONLY"

Sent 5/25
Pat

ETRHOP AA33618
TWINSBURG OH 5-25-83

ATTN ALAN JACKSON

(ILLEGIBLE) SERVICE (ILLEGIBLE) ARE CONSIDERING MARKETING

FOR WHATEVER IT IS WORTH I WOULD LIKE TO STRONGLY SUGGEST TO YOU TO USE THEIR SERVICES. I.E.M. HAS PERFORMED EXTREMELY WELL FOR US IN THE U.S. AND AS I UNDERSTAND IT THEY ARE PERFORMING VERY WELL FOR L & B. I ALSO FEEL THEY HAVE DONE A TREMENDOUS JOB IN CREATING A MARKET IN AUSTRALIA.

YOU CAN HAVE HANDED TO YOU ON A SILVER PLATTER A MARKET THAT REQUIRES NO COST TO YOU EXCEPT MANUFACTURING AND MATERIAL COST. THAT IS THE PREMISE I HAVE OPERATED ON AND WE HAVE KEPT OUR COST A MINIMUM AND ENJOYED EXCELLENT MARGINS.

IF YOU HAVE ANY DOUBTS OR QUESTIONS ABOUT CONTINUING WITH I.E.M. AND SQUIBB CALL ME AND I WILL GIVE YOU AS MUCH INFO AS I CAN. REALLY YOU WILL SAVE YOURSELVES A LOT OF COST AND HEADACHES. I AM ONLY GIVING YOU MY BEST ADVICE AFTER TWO YEARS OF EXPERIENCE. PLEASE LET ME KNOW YOUR THOUGHTS.

REGARDS

K M LEIGHTON
SORBO INC TWBG
810 427 9201
PARA #1 AGAIN —

I HEAR FROM I.E.M. AND SQUIBB THAT YOU ARE CONSIDERING MARKETING WITHOUT THE SERVICES OF I.E.M. AND SQUIBB.

BTRHOP AA38618. . . . .
003.7 MINS
P

PLAINTIFFS' EXHIBIT 482

FEB 21 1983

LOGO

BTR INDUSTRIES LIMITED

HORNINGLOW WORKS BURTON ON TRENT STAFFS TELEPHONE 0283 31155
TELEX 34419 CABLES BRITGOODS BURTON ON TRENT

OUR REF GWK/LH

YOUR REF

DATE 11 February 1983

"CONFIDENTIAL"

Mr. K. M. Leighton,
Sorbo Inc.,
1670 Enterprise Parkway,
Twinsburg,
Ohio 44087,
U.S.A.

Dear Ken,

Thanks for the copy letter that you sent from Schneider, Smeltz, Huston & Ranney in which they describe the anti-trust laws in the United States in relation to the Sorbothane licence. Armed with this copy letter and with your recent, very encouraging, sales figures for Sorbothane I have gone straight back to BTG again with a formal request for the licence in United States to become exclusive. I will let you know as soon as I have some reaction from them.

Yours sincerely,

/s/ GEORGE KEELING
G.W. Keeling,
Director,
BTR DEVELOPMENT SERVICES LIMITED

PLAINTIFFS' EXHIBIT 483

"CONFIDENTIAL-COUNSEL AND EXPERTS ONLY"

KML—1-83

NOTES OF MEETING WITH K. M. LEIGHTON
at Providence—Thursday, March 31, 1983

1. *CBS—Manglors*

KML's letter to Dan Kaplan of 3/22 refers. This matter still under review by Steve Howard, who will respond in due course.

2. *Goodyear Wingfoot XL*

KML's letter to me of 3/23 enclosing a copy of Maky Renner Otto & Boisselle letter to Goodyear of 3/10.

This is definitely a look-alike. We must have Goodyear desist from continuing their program. I am taking correspondence and the Wingfoot sample to UK to show Don Tapley and alert him to the possibility that this product will be marketed in the UK.

KML will keep me informed as matters develop between Goodyear counsel and Maky Renner Otto & Boisselle.

3. *Distributor Agreement*

Steve Howard's letter of 1/26 to KML refers.

Major distributors of Sorbo are concerned about the 90-day notice clause. Given the revenue investment they make in promotion and market development, they feel that they are not adequately covered in the event that BTR changes its mind or decides to change distribution outlet on a whim.

I have suggested that we put this question into a holding pattern for 90 days until Chris Risley has completed his assignment.

We should not tie ourselves into any distribution agreement which is not in the long-term interest of Sorbo. Our company is new; it could still be premature to conclude anything other than a very short-term arrangement with a distributor.

4. *Computer*

The IBM personal computer has not yet been delivered. In view of the time-consuming delays we have had on the DEC, we should question whether this is the right time to burden both Sorbo and Hamilton Kent.

Joe Gentile will discuss this matter with Dennis Pijor when he is in Kent next week.

5. *Nike Agreement*

The Nike agreement has been signed. The agreement is as per the document drawn by Dan Kaplan.

6. *Consulting Agreement with Maurice Hiles*

The consulting agreement has been signed between Sorbo and Maurice Hiles and is in line with the document drafted by Dan Kaplan.

I have told KML that I do not want Maurice carrying out any work on Sorbothane for third parties.

Sorbo should determine what work they wish Maurice to undertake. This work can be at the instigation, suggestion or behest of our distributors or their customers. The work should not be undertaken until we have agreed that it fits in with our marketing strategy. Any work initiated will be paid for by Sorbo.

KML understands my position, but is still concerned that it could be difficult to contain Maurice because of his own personality.

Ken and I have agreed that we will endeavor to have L&B in the UK invite Maurice to consult for them also. This will help Maurice's ego and also enable him to devote some of his time to traveling and to being in the UK.

7. *KML Employment Contract*

Ken and I had a very frank and useful discussion about his future with our company. Ken's contract finishes on 6/30/83. I asked Ken what his wishes were with regard to the future. Ken intends to continue working for some time to come. In the event that a new contract was not negotiated with BTR, Ken would intend to go into business for himself.

Ken would very much like to continue with Sorbo. He has been an evangelist of the product. The past year has shown interested parties that it is more than a whim. The product has substance and we can build a fine business provided we control the child's growth. Ken would like to stay with our company.

For BTR, I have told Ken that we would like him to stay and continue running our Sorbothane affairs. I will ask Dan Kaplan to draw up a new contract which we will send over to Ken for his perusal and agreement.

In reviewing Ken's performance over the past year and his future employment, I told him of some concerns I had which can be summarized as follows:

(i) I believe that de facto a conflict of interest does exist in respect of Ken Leighton, who is responsible for Sorbo, Inc., and Ken Leighton, Jr., who runs Ohio Cushions.

Ken is very aware of this situation. It bothers him every working day. He bends over backward to be impartial, but understands that the situation exists.

(ii) *Market shares*: The disposition of our distribution is such that three customers, Ohio Cushions, I.E.M. and Sorboturf, accounted for 83% of the company's sales May through December 82.

This is an exposed position and is too dependent on these three houses for the very future of our company.

(iii) *Knowhow*: I do have genuine concerns about protecting the Sorbothane knowhow. I am relieved that we have signed the consulting agreement with Maurice Hiles, but am very worried when Ken wants to write side letters which allow Maurice to go directly to our distributors.

Ken understands my concern. He does not share it. He is prepared to insure that the consulting agreement as drawn is honored.

I made the following proposal to Ken which addresses my concerns, which are:

(a) *Distribution*: that by 12/31/83 no one outlet of Sorbothane will represent more than 20% of the company's sales. By 12/31/84 no one customer will represent more than 15% of the company's sales.

This is not to imply that we would cut back on any of our major distributors. We would broaden the base of the business more quickly than had been envisioned. This exercise would increase our sales and decrease our dependence on our current distributors.

Ken has no problem with this. He believes that as his plans are drawn this will happen in any event. He will, however, ensure that it now takes place to the critical dates above.

(b) *Marketing*: I have told Ken that I want Sorbo to control the Sorbothane market. They will determine what avenues the company expands and diversifies into. They will determine the manner in which this diversification takes place. We will allocate the technical resource to ensure that we have the product to meet new market needs.

I proposed and Ken has agreed that we will put Chris Risley into Sorbothane for three months to write a marketing strategy which addresses the major issues and is acceptable to Ken and myself.

At the conclusion of this study, a marketing person will be hired who will implement and carry out this marketing strategy. The strategy will cover a three-year span.

(c) *Technical*: We will provide a development laboratory for the exclusive use of Maurice to be used when he is engaged on developing Sorbothane products. If no space exists at Twinsburg, we will rent some from Hamilton Kent at Kent, Ohio. We will install a laboratory there which will be kept under lock and key and will only be used by Maurice Hiles in the pursuit of development work authorized by Ken Leighton.

(d) *Succession*: We will by the end of 1984 identify a manager who would be capable of succeeding Ken as president. We should think about including this parameter when we go find our marketing person.

> Ken understands that the company needs to have substance. There is no one at the moment to replace Ken. This is not a good position for a fledgling company. We must address this issue as a matter of some urgency.

In summary, then, we can arrive at a situation where Ken is under contract as the president of Sorbo; we have a marketing strategy which addresses the major issues and channels our development effort into those areas where we want them to be; where we will be selling our product through a chain of distributors and not direct to the end user; where no distributor in 1984 will have more than 20% of our business and in 1985 not more than 15% of our business; Maurice Hiles will be engaged exclusively on assignments given to him by us for which we pay and over which we have ownership. If these things are done, I will feel much more comfortable about our subsidiary and believe that these actions will enure to the greater success of the enterprise.

John C. Cahill

JCC/bt
3/31/83

PLAINTIFFS' EXHIBIT 1075T

"CONFIDENTIAL-OUTSIDE COUNSEL ONLY"

S W IND PVD
JUNE 1, 1982

JUNE 1, 1982

ATTN; DAVID SHARROCK

SUBJ; NIKE AGREEMENT

I HAVE NOT SEEN THE AGREEMENT. I THINK IT WOULD BE MOST UNWISE TACTICALLY FOR US TO GIVE NIKE AN EXCLUSIVE.

IF WE HAVE A GOOD PRODUCT, AND IT LOOKS AS THOUGH WE DO, WE CAN GAIN MUCH GREATER EXPLOITATION BY CARVING THE WORLD UP. I KNOW THAT ADIDAS IN EUROPE IS VERY INTERESTED IN PUTTING THIS INTO THEIR SHOE. FEZ HAVE A MOISTURE-ABSORBENT FELT M MATERIAL AND A MARRIAGE BETWEEN THIS AND SORBO COULD BE A STUNNING SUCCESS FOR US.

LET'S LIAISE ON THIS WHEN YOU HAVE HAD A CHANCE TO READ THE AGREEMENT.

REGARDS,

JOHN CAHILL. . . . .
1334EDT 002.90

PLAINTIFFS' EXHIBIT 1181T

NOTES: NORTH AMERICA REORGANIZATION

First Draft
Comments

I. Character:

A. HK is reorganizing along market segments vs. territorial segments. They are:

Athletic;
Medical.

B. HK is taking more responsibility and control for the market approach of each segment. (via IEM & Ohio Cushions)

C. Distributor expenses to be reduced

D. IEM & O.C. to act as market Coordinators based upon their:

Proximity;
Performance;
Experience.

E. Duties of Marketing Coordinators:

Implementation of consistent mktg. strategy;
Inventory carriage;
Implementation of advertising campaign;
Forecasting;
New product analysis;
To support and initiate HK policies.

F. This is not an exclusive arrangement.

II. Reasons

A. Poor sales activity sales to date 1/31/82 below:

Absorbotech	RHR	Sorboturf	Ohio Cushions	Triad	IEM
$12,623.25	$32032.84	$23409.20	$51195.90	$33822.63	$753.41

B. Poor accounts receivable

C. Poor national coordination of individual markets.

D. Present structure limits:

National sales;
National advertising;
Consistent pricing structure

E. HK profit poor.

III. Arguments HK should be prepared for (Devil's advocate)

1. Why pick IEM & OC?
2. Poor sales due to:

   No advertising support
   No boxes until November
3. Money has been invested
4. Not enough time given
5. Territories are not equal in size and climate

IV. Image that could be presented to Distributors

A. Mktg. coordinators are extensions of HK

B. Any policies initiated by Coordinators are HK policies

C. HK submits price list.

V. Duties:

A. Mktg. Coordinates to submit market strategy for 1983 and initiate immediately after HK approval

B. Inventory carriage—enough inventory should be carried by Coordinators to allow Distributors no more than a two week lead time on orders. This will negate an inventory expense for Distributors. A set inventory level should be agreed upon by Coordinators & HK.

C. Amount of drop shipping to be done on behalf of the Dist. should be considered.

D. Advertising. An ad budget for 1982 should be submitted to HK immediately by Coordinators. Once a budget is agreed upon, an ad schedule for 1982 should be prepared. It should consider:

Point of Purchase Material;
Print media;
Packaging;
Endorsements;
Sales lit. ie. brochures

All ad themes should be submitted for approval.

E. Forecasting—A forecast could be submitted monthly to HK for a set time frame. This would allow HK to plan production.

*It would be advantageous to have the above information ready to submit to the Distributors at the meeting on Feb. 10. This info will add more credibility to the reorganization.

VI. Pricing—Below are several price schedules which could be considered:

A. HK sells to Coordinators who resells to Distributors

	HK	*GP*	*MC*	*GP*	*DIST.*	*List (Retailer)*
Soles	$3.50	25%	$4.67	33%	$7.00	$13.95
Heels	2.25	25%	$3.00	33%	$4.50	8.95
Soles	3.50	30%	5.00	29%	7.00	13.95
Heels	2.25	30%	3.21	29%	4.50	8.95

B. HK sells to Coordinator who retains title thru to retailer. Dist. work commission

	HK	*Coordin.*	*Dist. Commission*	*List (Retailer)*
			25% curr	
Soles	$3.50	$7.00	1.75	$13.95
Heels	2.25	4.50	1.13	8.95

* The prices might be more acceptable if they come from HK instead of the Coordinators.

VI. Questions

A. Do they plan to keep same Dist. territories or allow national mktg.?

National marketing has already taken place in the medical field.

B. How will national accts. be handled?

C. Do Coordinators plan to add additional Distributors?

D. Which market should Drug and Sports Medicine be assigned?

VII. Recommendations

A. We offer to pay for show (w/Ohio Cushions)

B. Distributors can only be dismissed with our approval.

C. A monthly report from each Coordinator covering:

Sales to be handed in
Advertising to be handed in
Forecasting to be handed in

The 21 of each month for the following month.

D. Our logotype is used in North America.

E. Dr. McCone should be considered for industrial sales

PLAINTIFFS' EXHIBIT 1245

INTERMEMO

TO Mr. K. M. Leighton AT Sorbo Inc DATE 27.6.83

FROM G. W. Keeling AT BTR Burton

cc Mr. J. Cahill
Mr. A. Foggan

SORBOTHANE

You will see from the attached letter that I now have confirmation from BTG that they are handling another patent from Maurice Hiles. BTG say that they have accepted it from him in good faith having first asked him whether he was free to assign it to them and Maurice gave his assurance that he was not limited by any contract with BTR or any other company.

BTG will offer a licence, non-exclusive, to BTR and they are sending me a copy of the patent specification.

Ken Hills of BTG told me that Goodyear has already approached them for a licence, I can only assume that Goodyear were told about it by Maurice Hiles. Ken Hills says that he feels morally bound to give first opportunity to BTR. He is already arranging for me to meet his Director to try to resolve the position on extending the present Sorbothane licence, it may be possible to wrap this new patent up in the same agreement.

Before we get in to any negotiations with BTG on this new patent it would be useful if you could let me know whether your contract with Maurice gives us any rights to ownership of his patents.

/s/ GEORGE
G. W. Keeling

"CONFIDENTIAL-COUNSEL AND EXPERTS ONLY"

DEFENDANTS' EXHIBIT QA

SORBOTURF ENTERPRISES

BALANCE SHEET

JUNE 30, 1983

ASSETS		
CURRENT		
Cash in bank	$ 5,166	
Cash-Money Market	16,668	
Accounts Receivable	76,231	
Inventory	24,558	
Loan—C. McCone	2,400	
Total Current Assets		$125,023
FIXED ASSETS		
Auto		19,579
		$144,602
LIABILITIES & CAPITAL		
LIABILITIES		
Current		
Accounts Payable	$63,308	
Loan B/A—Auto	4,757	
Total Current Liabilities		$ 68,065
Long-Term		
Note—D. McCone	10,000	
Note—S. McCone	14,455	
Loan B/A-Auto	11,500	
		35,955
		104,020
CAPITAL		
Balance 1/1/83	3,145	
Net Income	43,064	
	46,209	
Draws	(5,627)	40,582
TOTAL LIABILITIES & CAPITAL		$144,602

SORBOTURF ENTERPRISE

PROFIT & LOSS

SIX MONTHS ENDED 6/30/83

SALES	$237,409	
Less: Returns	(11)	$236,377
COST OF SALES:		
Inventory 1/1/83	34,677	
Purchases	87,590	
	122,267	
Inventory 6/30/83	24,558	97,709
GROSS PROFIT		$138,668
OPERATING EXPENSES:		
Freight	9,381	
Repairs	811	
Commissions	15,895	
Rent	5,400	
Supplies	6,168	
Telephone & Utilities	5,843	
Advertising	24,320	
Travel	1,435	
Show Booths	1,437	
Legal	15,779	
Licenses & Dues	44	
Insurance	529	
Warehouse Expenses	5,400	
Postage	206	
Accounting	800	
Entertainment	471	
Auto	702	
R&D	250	
Promotion	55	
Misc.	414	
Outside Labor	264	95,604
NET OPERATING PROFIT		$ 43,064

SORBOTURF ENTERPRISES

BALANCE SHEET

MARCH 31, 1983

CONFIDENTIAL-SUBJECT TO
PROTECTIVE ORDER

ASSETS

CURRENT		
Cash in Bank	$ 1,702	
Cash-Money Market	3,668	
Accounts Receivable	64,837	
Inventory	18,352	
Total Current Assets		$ 88,559
TOTAL CURRENT ASSETS		$ 88,559

LIABILITIES & CAPITAL

LIABILITIES		
Current		
Accounts Payable	$52,903	
Total Current Liabilities		$ 52,903
Long-Term		
Note—D. McCone	10,000	
Note—S. McCone	14,455	$ 24,455
		77,358
CAPITAL		
Balance 1/1/83	3,145	
Net Income	10,058	
	13,203	
Draws	(2,002)	11,201
TOTAL LIABILITIES & CAPITAL		$ 88,559

Martin R. Bloomenstein, C.P.A.
1109 E. San Bernardino Road
Suite 240
Covina, California 91722
966-8594

SORBOTURF ENTERPRISE
PROFIT & LOSS
THREE MONTHS ENDED 3/31/83

SALES	$114,124	
Less: Returns	(11)	$114,113
COST OF SALES:		
Inventory 1/1/83	34,677	
Purchases	40,917	
	75,594	
Inventory 12/31/82	18,352	57,242
GROSS PROFIT		$ 56,871
OPERATING EXPENSES:		
Freight	3,955	
Repairs	41	
Commissions	5,627	
Rent	2,700	
Supplies	2,995	
Telephone & Utilities	2,659	
Advertising	11,031	
Travel	935	
Show Booths	2,161	
Legal	12,859	
Licenses	11	
Insurance	-0-	
Warehouse Exp.	2,700	
Interest	-0-	
Accounting	400	
Entertainment	74	
Auto	556	
R&D	250	
Bad Debts	-0-	
Misc.	20	46,813
NET OPERATING PROFIT		$ 10,058

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SORBOTURF ENTERPRISES

BALANCE SHEET

DECEMBER 31, 1982

CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER

ASSETS		
CURRENT		
Cash in Bank	$ 5,163	
Cash-Money Market	5,000	
Accounts Receivable	40,833	
Inventory	34,677	
Total Current Assets		$ 85,673
TOTAL CURRENT ASSETS		$ 85,673
LIABILITIES & CAPITAL		
LIABILITIES		
Current		
Accounts Payable	$56,573	
Interest Payable	1,500	
Total Current Liabilities		$ 58,073
Long-Term		
Note—D. McCone	10,000	
Note—S. McCone	14,455	$ 24,455
		82,528
CAPITAL		
Balance 1/1/82	(2,318)	
Net Income	27,168	
	24,850	
Draws	(21,705)	3,145
TOTAL LIABILITIES & CAPITAL		$ 85,673

SORBOTURF SENTERPRISES
PROFIT & LOSS
YEAR ENDED DECEMBER 31, 1982
CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER

SALES	$302,497	
Less: Returns	(1,191)	$301,306
COST OF SALES:		
Inventory 1/1/82	4,466	
Purchases	198,674	
	203,140	
Inventory 12/31/82	34,677	168,463
GROSS PROFIT		$132,843
OPERATING EXPENSES:		
Freight	10,882	
Repairs	376	
Commissions	18,621	
Rent	9,599	
Supplies	5,216	
Telephone & Utilities	7,094	
Advertising	31,032	
Travel	5,347	
Show Booths	2,161	
Legal	6,135	
Licenses	90	
Insurance	140	
Warehouse Exp.	5,882	
Interest	1,500	
Accounting	200	
Entertainment	323	
Auto	360	
R&D	448	
Bad Debts	639	
Misc.	48	106,093
NET OPERATING PROFIT		$ 26,750
INTEREST INCOME		418
PROFIT		$ 27,168

PROFIT AND LOSS STATEMENT

NAME Sorboturf Enterprises 9/30/82

	PERIOD FROM 9/1 TO 9/30		% OF SALES	YEAR TO DATE 1982		% OF SALES
GROSS SALES	29567.61			237662.03		
LESS SALES RETURNS & ALLOWANCES				903.31		
NET SALES		29567.61	100.0		236758.72	100.0
COST OF SALES						
BEGINNING INVENTORY	14082.00			4465.75		
PURCHASES	16256.64			99547.80		
TOTAL	30338.64			104013.55		
ENDING INVENTORY	15767.82			15767.82		
COST OF GOODS SOLD		14570.82	49.3		119781.37	50.6
GROSS PROFIT ON SALES		14996.79			116977.35	
OPERATING EXPENSES						
ACCOUNTING & LEGAL				3764.33		
ADVERTISING	1929.76			26374.78		
AUTOMOBILE EXPENSE						
BAD DEBTS						
BUSINESS ENTERTAINMENT & PROMOTION						
BANK CHARGES				25.26		
CASH OVER & SHORT						
COMMISSIONS	1887.15			11490.61		
CONTRIBUTIONS						
DELIVERY EXPENSE	872.27			8277.75		
DEPRECIATION & AMORTIZATION						
DUES & SUBSCRIPTIONS						
INSURANCE				68.30		
INTEREST				1000.00		
JANITOR SERVICE						
LAUNDRY						
OFFICE SUPPLIES & POSTAGE						
OUTSIDE CONTRACTING						
PAYROLL						
WAREHOUSE	1720.00			4265.00		
RENT	2006.00			6987.02		
REPAIRS & MAINTENANCE				325.79		
SALES EXPENSE AND/OR PROMOTION						
SUPPLIES & SMALL TOOLS	187.32			2054.98		
TAXES & LICENSES	7154.00			7154.00		
TAXES—PAYROLL						
TELEPHONE & TELEGRAPH	735.45			4257.68		
TRADE SHOWS				1742.50		
TRAVEL	556.00			4101.19		
UTILITIES						
TOTAL OPERATING EXPENSES		17047.95			81889.19	
NET INCOME OR (LOSS) from OPERATIONS						
OTHER INCOME						
TOTAL OTHER INCOME		<2051.16>			35088.16	
NET INCOME OR (LOSS) FOR PERIOD						

PROFIT AND LOSS STATEMENT

NAME Sorboturf Enterprises August '82

	PERIOD FROM 8/1 TO 8/31		% OF SALES	YEAR TO DATE		% OF SALES
GROSS SALES	15925.89			208094.42		
LESS SALES RETURNS & ALLOWANCES	155.04			903.31		
NET SALES		15770.85	100.0		207191.11	100.0
COST OF SALES						
BEGINNING INVENTORY	19697.60			4465.75		
PURCHASES	2544.89			114826.80		
TOTAL						
ENDING INVENTORY	14082.00			14082.00		
COST OF GOODS SOLD		8160.49	51.7		105210.55	50.7
GROSS PROFIT ON SALES		7610.36	48.3		101980.56	49.3
OPERATING EXPENSES						
ACCOUNTING & LEGAL				3764.33		
ADVERTISING	284.12			24445.02		
AUTOMOBILE EXPENSE						
BAD DEBTS						
BUSINESS ENTERTAINMENT & PROMOTION						
BANK CHARGES	25.26			25.26		
CASH OVER & SHORT						
COMMISSIONS	1125.10			9603.46		
CONTRIBUTIONS						
DELIVERY EXPENSE	411.58			7405.48		
DEPRECIATION & AMORTIZATION						
DUES & SUBSCRIPTIONS						
INSURANCE				65.30		
INTEREST	125.00			1000.00		
JANITOR SERVICE						
LAUNDRY						
OFFICE SUPPLIES & POSTAGE						
OUTSIDE CONTRACTING						
PAYROLL						
WAREHOUSE EXPENSE	800.00			2545.00		
RENT	880.00			4981.02		
REPAIRS & MAINTENANCE				325.79		
SALES EXPENSE AND/OR PROMOTION						
SUPPLIES & SMALL TOOLS	340.27			1867.66		
TAXES & LICENSES				3.00		
TAXES—PAYROLL						
TELEPHONE & TELEGRAPH	241.33			3522.23		
TRADE SHOWS	242.50			1742.50		
TRAVEL				3545.19		
UTILITIES						
TOTAL OPERATING EXPENSES		4475.16			64841.24	
NET INCOME OR (LOSS) from OPERATIONS		3135.20			37139.32	
OTHER INCOME						
TOTAL OTHER INCOME						
NET INCOME OR (LOSS) FOR PERIOD						

CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER

Sorboturf

Profit & Loss

6/30/82

	MONTH	YEAR TO DATE
SALES	25,203.18	160,587.82
Returns	40.81	552.68
	25,162.37	160,035.14
Cost of Sales	11,694.51	82,118.80
Gross Profit	13,467.86	77,916.34
Expenses:		
Freight	1,103.10	5,488.00
Repairs		251.94
Commissions	2,409.65	6,381.20
Rent	880.00	3,294.00
Supplies	110.23	1,255.72
Telephone	340.39	2,488.32
Advertising	2,710.26	23,308.23
Travel	1,120.50	2,657.50
Shows/Booths		1,500.00
Legal	1,928.20	3,125.44
Accounting	220.00	220.00
Licenses		3.00
Insurance		65.30
Warehouse	945.00	945.00
TOTAL EXPENSE	11,767.33	50,983.65
NET PROFIT	1,700.53	26,932.69

BALANCE SHEET

5/30/82

CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER

	12/30/81		5/30/82	
ASSETS				
Cash	5762.58		22885.85	
Inventory	4465.75		20142.05	
Accounts Receivable	1542.28		56497.20	
Prepaid Advertising	10131.66			
		$21902.27		$99525.01
LIABILITIES				
Accounts Payable	-0-		53816.98	
Accrued Interest	-0-		750.00	
Notes Payable:				
McCone, (Dr.)	10000.00		10000.00	
McCone, S.	14155.11		14155.11	
McQuillan, F.	6000.00		14000.00	
TOTAL LIABILITIES		30155.11		92722.09
S. McCone, Drawing			<1418.51>	
McCone, Capital		<8252.84>	8221.43	6802.92
		$21902.77		$99525.01

PROFIT AND LOSS STATEMENT

NAME Sorboturf, Inc. 5/30/82

	PERIOD FROM	TO	% OF SALES	YEAR TO DATE		% OF SALES
GROSS SALES	30299.47			135384.64		
LESS SALES RETURNS & ALLOWANCES	206.49			511.87		
NET SALES		30092.98	100.0		134872.77	100.0
COST OF SALES						
BEGINNING INVENTORY	11078.30			4465.75		
PURCHASES	24367.44			86100.59		
TOTAL	35445.74			90566.34		
ENDING INVENTORY	20142.05			20142.05		
COST OF GOODS SOLD	15303.69	15303.69	51%	70424.29	70424.29	52%
GROSS PROFIT ON SALES		14789.29	49%		64448.48	48%
OPERATING EXPENSES						
ACCOUNTING & LEGAL	380.00			1197.24		
ADVERTISING	4015.77			20597.97		
AUTOMOBILE EXPENSE						
BAD DEBTS						
BUSINESS ENTERTAINMENT & PROMOTION						
BANK CHARGES						
CASH OVER & SHORT						
COMMISSIONS	1621.47			3971.55		
CONTRIBUTIONS						
DELIVERY EXPENSE	405.38			4384.90		
DEPRECIATION & AMORTIZATION						
DUES & SUBSCRIPTIONS						
INSURANCE						
INTEREST	750.00			750.00		
JANITOR SERVICE						
LAUNDRY						
OFFICE SUPPLIES & POSTAGE						
OUTSIDE CONTRACTING						
PAYROLL	2000.00			8000.00		
RENT	663.00			2414.00		
REPAIRS & MAINTENANCE				251.94		
SALES EXPENSE AND/OR PROMOTION						
SUPPLIES & SMALL TOOLS	132.17			1145.49		
TAXES & LICENSES	65.30			68.30		
TAXES—PAYROLL						
TELEPHONE & TELEGRAPH	906.76			2147.93		
TRADE SHOWS				1500.00		
TRAVEL	764.00			1537.00		
UTILITIES						
TOTAL OPERATING EXPENSES		11703.38	39.0		47966.31	35.
NET INCOME OR (LOSS) from OPERATIONS		3085.91			16482.17	
OTHER INCOME						
TOTAL OTHER INCOME						
NET INCOME OR (LOSS) FOR PERIOD		3085.91	10.0		16482.17	13.

PROFIT AND LOSS STATEMENT

NAME Sorboturf, Inc.

	PERIOD FROM	TO	% OF SALES	YEAR TO DATE		% OF SALES
GROSS SALES	44243.64			105085.17		
LESS SALES RETURNS & ALLOWANCES	305.38			305.38		
NET SALES		43938.26	100.0		104779.79	
COST OF SALES						
BEGINNING INVENTORY	11940.61			4465.75		
PURCHASES	17073.85			61733.15		
TOTAL	29014.46			66198.90		
ENDING INVENTORY	11078.30			11078.30		
COST OF GOODS SOLD	17936.16	17936.16		55120.60	55120.60	
GROSS PROFIT ON SALES		26002.10			49659.19	
OPERATING EXPENSES						
ACCOUNTING & LEGAL	350.24			817.24		
ADVERTISING	800.00			16582.20		
AUTOMOBILE EXPENSE						
BAD DEBTS						
BUSINESS ENTERTAINMENT & PROMOTION						
BANK CHARGES						
CASH OVER & SHORT						
COMMISSIONS	2002.13			2350.08		
CONTRIBUTIONS						
DELIVERY EXPENSE	1223.23			3979.52		
DEPRECIATION & AMORTIZATION						
DUES & SUBSCRIPTIONS						
INSURANCE						
INTEREST						
JANITOR SERVICE						
LAUNDRY						
OFFICE SUPPLIES & POSTAGE						
OUTSIDE CONTRACTING						
PAYROLL	2000.00			6000.00		
RENT	621.00			1751.00		
REPAIRS & MAINTENANCE	240.00			251.94		
SALES EXPENSE AND/OR PROMOTION						
SUPPLIES & SMALL TOOLS	281.46			1013.32		
TAXES & LICENSES	3.00			3.00		
TAXES—PAYROLL						
TELEPHONE & TELEGRAPH	453.41			1241.17		
TRADE SHOWS				1500.00		
TRAVEL	267.00			773.00		
UTILITIES						
TOTAL OPERATING EXPENSES		8241.47			36262.47	
NET INCOME OR (LOSS) from OPERATIONS						
OTHER INCOME						
TOTAL OTHER INCOME						
NET INCOME OR (LOSS) FOR PERIOD		17760.63			13396.72	

CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER

PROFIT AND LOSS STATEMENT

NAME Sorboturf Inc.

	PERIOD FROM 3/1 TO 3/31		% OF SALES	YEAR TO DATE		% OF SALES
GROSS SALES	50915.22			60841.53		
LESS SALES RETURNS & ALLOWANCES						
NET SALES	50915.22	50915.22		60841.53	60841.53	
COST OF SALES						
BEGINNING INVENTORY	17634.55			4465.75		
PURCHASES	24604.46			44659.24		
TOTAL	42239.01			49124.99		
ENDING INVENTORY	11940.61			11940.61		
COST OF GOODS SOLD	30298.40	30298.40		37184.38	37184.38	
GROSS PROFIT ON SALES		20616.82			23657.15	
OPERATING EXPENSES						
ACCOUNTING & LEGAL				467.00		
ADVERTISING	1383.23			15782.20		
AUTOMOBILE EXPENSE						
BAD DEBTS						
BUSINESS ENTERTAINMENT & PROMOTION						
BANK CHARGES						
CASH OVER & SHORT						
COMMISSIONS	347.95			347.95		
CONTRIBUTIONS						
DELIVERY EXPENSE	1863.47			2756.29		
DEPRECIATION & AMORTIZATION						
DUES & SUBSCRIPTIONS						
INSURANCE						
INTEREST						
JANITOR SERVICE						
LAUNDRY						
OFFICE SUPPLIES & POSTAGE						
OUTSIDE CONTRACTING						
PAYROLL	2000.00			4000.00		
RENT	400.00			1130.00		
REPAIRS & MAINTENANCE				11.94		
SALES EXPENSE AND/OR PROMOTION						
SUPPLIES & SMALL TOOLS	347.96			731.86		
TAXES & LICENSES						
TAXES—PAYROLL						
TELEPHONE & TELEGRAPH	568.70			787.76		
TRADE SHOWS	400.00			1500.00		
TRAVEL	268.00			506.00		
UTILITIES						
TOTAL OPERATING EXPENSES		7579.31		28021.00	28021.00	
NET INCOME OR (LOSS) from OPERATIONS						
OTHER INCOME						
TOTAL OTHER INCOME		13037.51				
NET INCOME OR (LOSS) FOR PERIOD					<4363.85>	

CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER

PROFIT AND LOSS STATEMENT

NAME Sorboturf, Inc.

CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER

	PERIOD FROM 1/1/82 TO 2/28/82		% OF SALES	YEAR TO DATE		% OF SALES
GROSS SALES	9926.31			9926.31		
LESS SALES RETURNS & ALLOWANCES						
NET SALES	9926.31	9926.31	100.0	9926.31	9926.31	100.0
COST OF SALES						
BEGINNING INVENTORY	4465.75			4465.75		
PURCHASES	20054.70			20054.70		
TOTAL	24520.45			24520.45		
ENDING INVENTORY	17634.55			17634.55		
COST OF GOODS SOLD	6885.90	6885.90		6885.90	6885.90	
GROSS PROFIT ON SALES	3040.41	3040.41		3040.41	3040.41	
OPERATING EXPENSES						
ACCOUNTING & LEGAL	467.00			467.00		
ADVERTISING	14398.97			14398.97		
AUTOMOBILE EXPENSE						
BAD DEBTS						
BUSINESS ENTERTAINMENT & PROMOTION						
BANK CHARGES						
CASH OVER & SHORT						
COMMISSIONS						
CONTRIBUTIONS						
DELIVERY EXPENSE	892.82			892.82		
DEPRECIATION & AMORTIZATION						
DUES & SUBSCRIPTIONS						
INSURANCE						
INTEREST						
JANITOR SERVICE						
LAUNDRY						
OFFICE SUPPLIES & POSTAGE						
OUTSIDE CONTRACTING						
PAYROLL	2000.00			2000.00		
RENT	730.00			730.00		
REPAIRS & MAINTENANCE	11.94			11.94		
SALES EXPENSE AND/OR PROMOTION						
SUPPLIES & SMALL TOOLS	383.90			383.90		
TAXES & LICENSES						
TAXES—PAYROLL						
TELEPHONE & TELEGRAPH	219.06			219.06		
TRADE SHOWS	1100.00			1100.00		
TRAVEL	238.00			238.00		
UTILITIES						
TOTAL OPERATING EXPENSES		20441.69			20441.69	
NET INCOME OR (LOSS) from OPERATIONS						
OTHER INCOME						
TOTAL OTHER INCOME						
NET INCOME OR (LOSS) FOR PERIOD		<17401.28>			<17401.28>	

DEFENDANTS' EXHIBIT MMB

7594

Cascade Orthopedic
686 Main St.
Chester, Ca 96020

5112	Net 30	DelMar 7-14-82	
125A		5.63	703.75
100B	prices reflect 15% increase		563.00
125C	from HK		703.75
50F			281.50
25G	heels will be $4.02		140.75
	postage		34.67
	back ordered: 125D, 125E, 100 small		2,427.42
	250 medium, 100 large heels		
	100 sheets 40 duro 1/8 inch		

DEFENDANTS' EXHIBIT IT

SORBOTURF
ENTERPRISES

Larry McQuillan
Shirley McCone

Dear Mr. Leighton,

There is a California Company playing with Wingfoot as a horse shoe pad. Because I do so much in the way of clinics and Chiropractic work in the area, they have asked me to act as a consultant to their R&D department. I have arranged to have some of their pads put on some of my client's horses to see if it works and if it holds up. I've recommended nothing but Sorbothane to this point but have had a whole lot of negative feedback about it breaking down and coming off too quickly. I will continue of course to keep referring all of the horse pad inquiries to Sterivet.

Because of my deep involvment in the horse world, I'm often asked to be involved with new products. Wingfoot is not the first. I spent hours of time and money putting together a marketing plan for the sorbothane pad and only got involved with wingfoot after you decided not to let me go ahead with Sorbothane. At the time I was approached by this group I had not heard from Dr. Vasko.

I will be happy to keep you informed about anything that develops with the Wingfoot research. My part certainly will not matter in the actual use of it in the Equine market and as it does'nt take any of my time or effort away from the sports market I trust you won't object to my being a consultant in the testing end of their project.

Mr. Leighton, I hope this puts your mind at ease. I'm sure you know that any great product is bound to inspire competition. Wingfoot is just one of several new shock absorbing pads that are being developed because of the 'That's Incredible' publicity.

I will be sending the soft insoles back to you this week. We recalled everything that went out from that shipment and are sorting out the bad ones. The majority of soles coming back are O.K. and we're simply re-shipping them. Most of our expense has been in crediting postage and in replacing some ruined pairs of shoes. We hope to have our cash flow back on an even keel by the middle of July and appreciate your patience in the meantime.

Please give me a call if you have any questions about the Wingfoot pads. I'll let you know how they seem to perform.

Sincerely,

/s/ SHIRLEY MCCONE
Shirley McCone

SORBOTHANE

2572 Unicornio Street, Rancho La Costa, CA 92008 • (619) 438-4506
outside of California • 1-800-952-3433

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

(LITB4.101-42)

No. 24

ATTEMPT TO MONOPOLIZE DEFINED

In addition to monopolization, plaintiffs (has) *have* alleged that defendants have attempted and conspired to monopolize trade. An attempt to monopolize has (two) *three* elements: (1) a specific intent on the part of defendants or *any one* (either) of them to monopolize (and) (2) the employment of some practices which would result in monopolization if successful but, though unsuccessful, approach so close as to create a dangerous probability of success *and (3) damages suffered by the plaintiffs as the proximate result of the attempt.* Thus there are two distinctions between the offense of monopolization and the offense of attempt to monopolize that you should have in mind. To prove the offense of attempt to monopolize, (1) plaintiffs must show that defendants specifically intended to monopolize the market and (2) plaintiffs need not show that defendants succeeded in their attempt to monopolize, but must show that defendants' attempt approached so close as to create a dangerous probability of monoplization.

Antitrust Civil Jury Instructions at page 113 (Section of Antitrust Law, A.B.A. 1980 ed.)

No. 25

SPECIFIC INTENT IN ATTEMPT DEFINED

Question A deals with intent, and the law requires that, before you find an attempt to monopolize, you must find that *defendants* (Morrell) had a specific intent to control prices or destroy competition with respect to *the relevant market.* (all pork and pork products.) An intent to compete (in Montana) or to increase sales (in Montana), even at the expense of competitors, is not in itself enough to constitute a specific intent to monopolize.

You may find a specific intent from the words spoken or written by officers or employees of (Morrell) *defendants* or from the acts done by them. In other words, there may be circumstantial evidence of a state of mind. In this connection, however, the state of mind must be found in the evidence and may not be based on conjecture or speculation. It is presumed that private transactions have been lawful. That presumption may be overcome by evidence to the contrary. If, however, you find that, viewed in their entirety, the natural and probable consequence of (Morrell's) *defendants'* acts was the elimination of competition, then you may infer that (Morrell) *defendants* intended that as the natural and probable consequence of its acts and had the requisite specific intent.

The proof need not show knowledge of the defendants that a particular act or failure to act is a violation of the federal antitrust laws. Every person is charged with knowing what the law forbids and what the law requires to be done.

Antitrust Civil Jury Instructions at page S-25 (Section of Antitrust Law, A.B.A. 1985 Supp.)

No. 26

INFERENCE OF INTENT

You may not infer the specific intent to attempt to monopolize if the conduct alleged by the plaintiffs to show such an intent had a legitimate business reason or actually benefited the competition. This is true even if you find that the defendants also had the intent, in part, to limit or affect the plaintiffs' ability to compete. The actions taken by the defendants must have no purpose or effect other than the attempt to monopolize.

Oahu Gas Serv., Inc. v. Pac. Resources, Inc., 838 F.2d 360 (9th Cir. 1988); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

No. 29

DANGEROUS PROBABILITY DEFINED

If you find that defendants had a specific intent to monopolize the relevant market, you must then ask whether plaintiffs *have* (has) established by a preponderance of the evidence that defendants engaged in one or more predatory or anticompetitive acts in furtherance of that intent. If you find that defendant *have* (has) engaged in such acts, you must then ask whether plaintiffs (has) *have* established by a preponderance of the evidence that there was a dangerous probability that defendant would succeed in monopolization. A dangerous probability of success may be inferred either (1) from direct evidence of specific intent to monopolize plus proof of conduct directed to accomplishing the unlawful design, or (2) from evidence of conduct alone, provided that the conduct is also of the sort from which specific intent can be inferred. If a dangerous probability of success is to be inferred from conduct alone, then, the question of market power is relevant, as it was in answering the questions of whether defendant had a specific intent to monopolize. For example, if market conditions are such that a course of conduct described by plaintiffs would be unlikely to succeed in monopolizing the market, it is likely that the defendants actually attempted to monopolize the market. Conversely, a company with substantial market power may find it more rational to engage in a monopolistic course of conduct than would a smaller firm in a less concentrated market.

Generally speaking, conduct that will support a claim of attempted monopolization must be such that its anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the defendant's ability to reap the benefits of monopoly power.

Antitrust Civil Jury Instructions at pages S31-32 (Section of Antitrust Law, A.B.A. 1985 Supp.)

No. 30

CONSPIRACY TO MONOPOLIZE DEFINED

There are four essential elements which the plaintiffs (Association) must prove in order to establish its claim that *defendants* (Sunkist) conspired (with Reliance) to monopolize within the meaning of Section 2 of the Sherman Act:

(1) That there was a conspiracy between *defendants* (Sunkist and Reliance) to monopolize an appreciable amount of identifiable interstate or foreign commerce of the United States, which commerce plaintiffs (Association) claim(s) to be *the market as previously discussed* (export of oranges grown in California and Arizona to Hong Kong);

(2) That, if so, *defendants* (both Sunkist and Reliance) entered into such conspiracy with the specific intent to monopolize that commerce;

(3) That one or more of the acts claimed by plaintiffs (Association) in its Section 2 claims was done, and was in furtherance of such conspiracy to monopolize;

(4) That if so, separately with respect to the plaintiffs' (Association's) claim (for each of its seven members), the conspiracy so established was the proximate cause of damage to the business or property of (that member of) plaintiffs (Association), by causing *plaintiffs* (that member) to lose sales on which *plaintiffs* (that member) would have made a profit.

The burden is on plaintiffs (Association) to establish each of these elements by a preponderance of the evidence in the case.

(As to any member as to which you find the plaintiff Association has not sustained the burden of proof as to

all of the above elements, the plaintiff Associations cannot recover on the claim of such member.)

In proving *their* (its) claim of conspiracy to monopolize by (Sunkist and Reliance) *defendants* as distinguished from its claim of monopolization (by Sunkist alone), plaintiffs (Association) need not establish a relevant market sought to be monopolized. It must, however, establish a specific intent to monopolize, and that some appreciable part of the foreign commerce of the United States is subject to the conspiracy.

The term "conspiracy to monopolize" as used in Section 2 of the Sherman Act means the joint acquisition or maintenance by members of the conspiracy formed for that purpose of the power to control and dominate foreign trade and commerce of the United States in a commodity to such an extent that they are able, as a group, to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power.

I shall give you some elaboration on the concept of specific intent as it applies to an alleged conspiracy to monopolize.

In order to establish that (Sunkist has) *defendants have* conspired and agreed (with Reliance) to monopolize foreign trade and commerce, it takes two people to conspire, as I have indicated. But to establish that they have conspired and agreed with one another to monopolize foreign trade and commerce, the plaintiffs (Association) again must prove by a preponderance of the evidence that each intended to conspire one with the other. In other words, you must be satisfied that *each defendant* (both Sunkist and Reliance) had specific intent to achive monopolization and that they jointly agreed to carry out a plan or scheme to attain monopolization.

Antitrust Civil Jury Instructions at pages 119-120, (Section of Antitrust Law, A.B.A. 1980 ed.)

No. 31

SPECIFIC INTENT FOR CONSPIRACY TO MONOPOLIZE DEFINED

I have instructed you that the Plaintiffs, in order to prove a conspiracy to monopolize, (is) *are* required among other elements to prove that the Defendants acted with specific intent. Thus in order for the Plaintiffs to prevail on the conspiracy or the monopolize charge you must find from a preponderance of the evidence that the Defendants (and Standard Oil Company) acted with the specific intent in mind to destroy competition or to build a monopoly in the *relevant market* (sale of motor gasoline in Tucson.) The existence of that specific intent may be proved from the evidence of actual conduct. However, rough competition is not by itself proof of specific intent to monopolize.

An intent to resist the inroads of other competitors on a market share is not by itself proof of specific intent to monopolize.

Conduct which arises from prudent business judgment is not proof of specific intent to monopolize. Rather the Plaintiffs must show that the Defendants had the specific intent of gaining an illegal degree of market control and the power to eliminate other (brands of gasoline) *competitors* from the market or to fix prices in the market.

Antitrust Civil Jury Instructions at page 115, (Section of Antitrust Law, A.B.A. 1980 ed.)

No. 32

PROXIMATE CAUSE DEFINED

In accordance with my previous instructions, in order to prove the essential elements of plaintiffs'('s) claim, the burden is on the plaintiffs to establish by a preponderance of the evidence, the following facts: First, that defendants have violated the antitrust laws in one or more of the particulars as to which I have previously instructed you; and secondly, that said violations have been a proximate cause of some injury and consequent damage sustained by *plaintiffs* (Mt. Hood) in *their* (its) business or property.

An injury or damage is proximately caused by an act or failure to act, whenever it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

This does not mean that the law recognized only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause. Therefore, if you find that a violation of the antitrust laws played a substantial part in causing any injury to plaintiffs, you should find that the violation was a proximate cause.

Antitrust Civil Jury Instructions at page 166, (Section of Antitrust Law, A.B.A. 1985 Supp.)

JHB

Civil No. 84-1585-E(CM)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

SPECIAL VERDICT FORM

(July 11, 1988)

We, the jury in the above-entitled case, unanimously conclude and find as follows:

I

ALTER EGO

Do you find by a preponderance of the evidence that SORBOTHANE, INC. (aka SORBO, INC.) and/or HAMILTON-KENT MANUFACTURING COMPANY, INC. was the agent or alter ego of BTR, INC.?

If your answer is "Yes", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

	(A) "YES"	(B) "NO"
Defendant		
SORBOTHANE, INC. (aka SORBO, INC.)	Yes	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	Yes	

You will be asked later in this form to determine the amount of money that would fairly and reasonably compensate SORBOTURF ENTERPRISES for its damages, if any, proximately caused by the alleged wrongful acts of the defendants. At the end of this form, there is a page identifying *each* defendant and the claims for which plaintiffs contend that the defendant is liable. You will be asked to assess damages for *each* defendant and *each* claim separately.

If you answer "yes" to the above question as to SORBOTHANE, INC. (aka SORBO, INC.), then you must also assess damages against BTR, INC., as well as SORBOTHANE, INC. (aka SORBO, INC.), for the damages caused by SORBOTHANE, INC., if any. By way of example, if you find that SORBOTHANE, INC. must pay damages to SORBOTURF ENTERPRISES on the breach of contract claim, then you must assess damages not only against SORBOTHANE, INC., but also against BTR, INC. for that claim.

If you answer "yes" to the above question as to HAMILTON-KENT MANUFACTURING COMPANY, INC., then you must also assess damages against BTR, INC., as well as HAMILTON-KENT MANUFACTURING COMPANY, INC., for the damages caused by HAMILTON-KENT MANUFACTURING COMPANY, INC., if any. By way of example, if you find that HAMILTON-KENT MANUFACTURING COMPANY, INC. must pay damages to SORBOTURF ENTERPRISES on the fraud claim, then you must assess damages not only against HAMILTON-KENT MANUFACTURING COMPANY, INC., but also against BTR, INC. for that claim.

II

FRAUD

Do you find from a preponderance of the evidence that any of the following defendants committed fraud upon SORBOTURF ENTERPRISES?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
SORBOTHANE, INC. (aka SORBO, INC.)	X	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SPECTRUM SPORTS, INC.		X
KENNETH M. LEIGHTON	X	
KENNETH B. LEIGHTON, JR.		X

III

BREACH OF ORAL CONTRACT

Do you find by a preponderance of the evidence that any of the following defendants breached an oral contract with SORBOTURF ENTERPRISES relating to its athletic distributorship?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SORBOTHANE, INC. (aka SORBO, INC.)	X	

IV

BREACH OF CONTRACT

STATUTE OF FRAUDS—ATHLETIC DISTRIBUTORSHIP

1. Do you find that the alleged oral contract related to the athletic distributorship could be performed within one year from the date it was made?

Yes X

No _____

If you answered "Yes" to Question No. 1, please do not answer Question Nos. 2 or 3.

2. Do you find that defendants HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) induced SORBOTURF ENTERPRISES to seriously change its position in reasonable reliance on the contract, and that unconscionable injury to SORBOTURF ENTERPRISES would result from a refusal to enforce the contract?

Yes _____

No _____

3. Do you find that defendants HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) would be unjustly enriched by a refusal to enforce the contract?

Yes _____

No _____

If you answered "No" to Question No. 1, the statute of frauds *will* bar plaintiffs' recovery, if any, on their claim for breach of contract relating to the athletic distributorship, unless you answered "Yes" to either Question Nos. 2 or 3.

If you answered "yes" to either Question Nos. 2 or 3, the statute of frauds will *not* bar plaintiffs' recovery, if any, on their claim for breach of contract relating to the athletic distributorship.

V

BREACH OF ORAL CONTRACT

Do you find by a preponderance of the evidence that any of the following defendants breached an oral contract with SORBOTURF ENTERPRISES relating to its equestrian distributorship?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SORBOTHANE,INC. (aka SORBO, INC.)	X	

VI

BREACH OF CONTRACT STATUTE OF FRAUDS—EQUESTRIAN DISTRIBUTORSHIP

1. Do you find that the alleged oral contract relating to the equestrian distributorship could be performed within one year from the date it was made?

Yes X

No _____

If you answered "Yes" to Question No. 1, please do not answer Question Nos. 2 or 3.

2. Do you find that defendants HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) induced SORBOTURF ENTERPRISES to seriously change its position in reasonable reliance on the contract, and that unconscionable injury to SORBOTURF ENTERPRISES would result from a refusal to enforce the contract?

Yes _____

No _____

3. Do you find that HAMILTON-KENT MANUFACTURING COMPANY, INC. and/or SORBOTHANE, INC. (aka SORBO, INC.) would be unjustly enriched by a refusal to enforce the contract?

Yes _____

No _____

If you answered "No" to Question No. 1, the statute of frauds *will* bar plaintiffs' recovery, if any, on their claim for breach of contract relating to the equestrian distributorship, unless you answered "Yes" to either Question Nos. 2 or 3.

If you answered "Yes" to either Question Nos. 2 or 3, the statute of frauds will *not* bar plaintiffs' recovery, if any, on their claim for breach of contract relating to the equestrian distributorship.

VII

BAD FAITH DENIAL OF THE EXISTENCE OF AN ORAL CONTRACT

Do you find by a preponderance of the evidence that any of the following defendants have, in bad faith, denied the existence of an oral contract with SORBOTURF ENTERPRISES regarding SORBOTURF's status as a distributor of Sorbothane products?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SORBOTHANE, INC. (aka SORBO, INC.)	X	

VIII

VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200, UNFAIR COMPETITION

Do you find by a preponderance of the evidence that any of the following defendants engaged in unfair competition in violation of California Business and Professions Code section 17200?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
SORBOTHANE, INC. (aka SORBO, INC.)	X	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SPECTRUM SPORTS, INC.	X	
KENNETH M. LEIGHTON	X	
KENNETH B. LEIGHTON, JR.	X	

IX

INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE

Do you find by a preponderance of the evidence that any of the following defendants interfered with the prospective business advantage of SORBOTURF ENTERPRISES?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
SORBOTHANE, INC. (aka SORBO, INC.)	X	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SPECTRUM SPORTS, INC.	X	
KENNETH M. LEIGHTON	X	
KENNETH B. LEIGHTON, JR.	X	

X

CONVERSION

Do you find from a preponderance of the evidence that any of the following defendants converted the property of SORBOTURF ENTERPRISES?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is 'NO", mark "X"after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
SORBOTHANE, INC. (aka SORBO, INC.)	X	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
KENNETH M. LEIGHTON	X	

XI

VIOLATION OF SECTION 1 OF THE SHERMAN ACT, RESALE PRICE FIXING

Do you find by a preponderance of the evidence that any of the following defendants violated section 1 of the Sherman Act, title 15 U.S. Code, by engaging in resale price fixing of Sorbothane products?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
SORBOTHANE, INC. (aka SORBO, INC.)	X	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SPECTRUM SPORTS, INC.		X
KENNETH M. LEIGHTON	X	
KENNETH B. LEIGHTON, JR.		X

XII

VIOLATION OF SECTION 1 OF THE SHERMAN ACT, MARKET ALLOCATION

Do you find by a preponderance of the evidence that any of the following defendants violated section 1 of the Sherman Act, title 15 U.S. Code, by engaging in a market allocation with the other manufacturer of Sorbothane products?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
SORBOTHANE, INC. (aka SORBO, INC.)	X	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
KENNETH M. LEIGHTON	X	

XIII

VIOLATION OF SECTION 2 OF THE SHERMAN ACT—MONOPOLIZING, ATTEMPTING TO MONOPOLIZE AND CONSPIRING TO MONOPOLIZE

Do you find by a preponderance of the evidence that any of the following defendants violated section 2 of the Sherman Act by monopolizing, attempting to monopolize, and/or conspiring to monopolize the market for Sorbothane products?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES'	(B) "NO"
SORBOTHANE, INC. (aka SORBO, INC.)	X	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SPECTRUM SPORTS, INC.	X	
KENNETH M. LEIGHTON	X	
KENNETH B. LEIGHTON, JR.	X	

XIV

VIOLATION OF SECTION 16600 OR 16700 OF THE CALIFORNIA BUSINESS & PROFESSIONS CODE—CARTWRIGHT ACT

Do you find by a preponderance of the evidence that any of the following defendants violated section 16600 or section 16700 of the California Cartwright Act?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
SORBOTHANE, INC. (aka SORBO, INC.)	X	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SPECTRUM SPORTS, INC.		X
KENNETH M. LEIGHTON	X	
KENNETH B. LEIGHTON, JR.		X

XV

VIOLATION OF SECTION 1962, TITLE 18
U.S. CODE—THE RACKETEERING ACT

Do you find by a preponderance of the evidence that any of the following defendants violated section 1962(a), title 18 U.S. Code—the Racketeering Act?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
SORBOTHANE, INC. (aka SORBO, INC.)	X	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SPECTRUM SPORTS, INC.		X
KENNETH M. LEIGHTON	X	
KENNETH B. LEIGHTON, JR.		X

XVI

VIOLATION OF SECTION 1962, TITLE 18
U.S. CODE—THE RACKETEERING ACT

Do you find by a preponderance of the evidence that any of the following defendants violated section 1962(b), title 18 U.S. Code—the Racketeering Act?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
SORBOTHANE, INC. (aka SORBO, INC.)	X	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SPECTRUM SPORTS, INC.	X	
KENNETH M. LEIGHTON	X	
KENNETH B. LEIGHTON, JR.	X	

XVII

VIOLATION OF SECTION 1962, TITLE 18 U.S. CODE—THE RACKETEERING ACT

Do you find by a preponderance of the evidence that any of the following defendants violated section 1962(c), title 18 U.S. Code—the Racketeering Act?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
SORBOTHANE, INC. (aka SORBO, INC.)	X	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SPECTRUM SPORTS, INC.	X	
KENNETH M. LEIGHTON	X	
KENNETH B. LEIGHTON, JR.	X	

XVIII

VIOLATION OF SECTION 1962, TITLE 18 U.S. CODE—THE RACKETEERING ACT

Do you find by a preponderance of the evidence that any of the following defendants violated section 1962(d), title 18 U.S. Code—the Racketeering Act?

If your answer is "YES", mark "X" after the name of that defendant in column "A."

If your answer is "NO", mark "X" after the name of that defendant in column "B."

Defendant	(A) "YES"	(B) "NO"
SORBOTHANE, INC. (aka SORBO, INC.)	X	
HAMILTON-KENT MANUFACTURING COMPANY, INC.	X	
SPECTRUM SPORTS, INC.	X	
KENNETH M. LEIGHTON	X	
KENNETH B. LEIGHTON, JR.	X	

XIX

DAMAGES

If you find for SORBOTURF ENTERPRISES on any of its claims, you must determine, based on a preponderance of the evidence, the amount of money, if paid now in cash, that would fairly and reasonably compensate SORBOTURF ENTERPRISES for its damages, if any, proximately caused by the wrongful acts of any of the defendants. The following pages identify the name of each defendant and the claims for which plaintiffs contend that the defendant is liable. If you find that any of the defendants are liable on any of the claims, you may award damages to the plaintiffs against those defendants. Should you decide to award damages, please assess damages for *each* defendant and *each* claim separately and without regard to whether you have already awarded the same damages on another claim or against another defendant. The court will insure that there is no double recovery. The verdict will *not* be totaled.

SORBOTHANE, INC. (aka SORBO, INC.)

Count		*Compensatory Damages*
I.	Fraud	$1.743M
II.	Breach of Oral Contract	$1.743M
III.	Bad Faith Denial of the Existence of an Oral Contract	$1.743M
IV.	Violation of California Business & Professions Code Section 17200, Unfair Competition	$1.743
V.	Interference With Prospective Business Advantage	$1.743
VI.	Conversion	$1.743
VII.	Violation of Section 1 of the Sherman Act, Title 15, Resale Price Fixing	$1.743
VIII.	Violation of Section 1 of the Sherman Act, Title 15, Market Allocation	$1.743
IX.	Violation of Section 2 of the Sherman Act—Monopolizing, Attempting to Monopolize and/or Conspiring to Monopolize	$1.743
X.	Violation of Section 16600 or 16700 of the California Business & Professions Code—Cartwright Act	$1.743
XI.	Violation of Section 1962, Title 18 U.S. Code—The Racketeering Act	$1.743

(ASSESS DAMAGES FOR EACH CLAIM SEPARATELY; VERDICT WILL NOT BE TOTALED)

HAMILTON-KENT MANUFACTURING COMPANY, INC.

Count	*Compensatory Damages*
I. Fraud	$1.743M
II. Breach of Oral Contract	$
III. Bad Faith Denial of the Existence of an Oral Contract	$
IV. Violation of California Business & Professions Code Section 17200, Unfair Competition	$
V. Interference With Prospective Business Advantage	$
VI. Conversion	$
VII. Violation of Section 1 of the Sherman Act, Title 15, Resale Price Fixing	$
VIII. Violation of Section 1 of the Sherman Act, Title 15, Market Allocation	$
IX. Violation of Section 2 of the Sherman Act—Monopolizing, Attempting to Monopolize and/or Conspiring to Monopolize	$
X. Violation of Section 16600 or 16700 of the California Business & Professions Code—Cartwright Act	$
XI. Violation of Section 1962, Title 18 U.S. Code—The Racketeering Act	$1.743M

(ASSESS DAMAGES FOR EACH CLAIM SEPARATELY; VERDICT WILL NOT BE TOTALED)

BTR, INC.

Count	*Compensatory Damages*
I. Fraud	$1.743M
II. Breach of Oral Contract	$
III. Bad Faith Denial of the Existence of an Oral Contract	$
IV. Violation of California Business & Professions Code Section 17200, Unfair Competition	$
V. Interference With Prospective Business Advantage	$
VI. Conversion	$
VII. Violation of Section 1 of the Sherman Act, Title 15, Resale Price Fixing	$
VIII. Violation of Section 1 of the Sherman Act, Title 15, Market Allocation	$
IX. Violation of Section 2 of the Sherman Act—Monopolizing, Attempting to Monopolize and/or Conspiring to Monopolize	$
X. Violation of Section 16600 or 16700 of the California Business & Professions Code—Cartwright Act	$
XI. Violation of Section 1962, Title 18 U.S. Code—The Racketeering Act	$1.743M

(ASSESS DAMAGES FOR EACH CLAIM SEPARATELY; VERDICT WILL NOT BE TOTALED)

SPECTRUM SPORTS, INC.

Count	*Compensatory Damages*
I. Fraud	$ -0-
II. Violation of California Business Professions Code Section 17200, Unfair Competition	$1.743M
III. Interference With Prospective Business Advantage	$1.743M
IV. Violation of Section 1 of the Sherman Act, Title 15, Resale Price Fixing	$ -0-
V. Violation of Section 2 of the Sherman Act—Monopolizing, Attempting to Monopolize and/or Conspiring to Monopolize	$1.743M
VI. Violation of Section 16600 or 16700 of the California Business & Professions Code—Cartwright Act	$ -0-
VII. Violation of Section 1962, Title 18 U.S. Code—The Racketeering Act	$1.743M

(ASSESS DAMAGES FOR EACH CLAIM SEPARATELY; VERDICT WILL NOT BE TOTALED)

KENNETH M. LEIGHTON

Count	*Compensatory Damages*
I. Fraud	$1.743M
II. Violation of California Business & Professions Code Section 17200, Unfair Competition	$
III. Interference With Prospective Business Advantage	$
IV. Conversion	$
V. Violation of Section 1 of the Sherman Act, Title 15, Resale Price Fixing	$
VI. Violation of Section 1 of the Sherman Act, Title 15, Market Allocation	$
VII. Violation of Section 2 of the Sherman Act, Monopolizing, Attempting to Monopolize and/or Conspiring to Monopolize	$
VIII. Violation of Section 16600 or 16700 of the California Business & Professions Code—Cartwright Act	$
IX. Violation of Section 1962, Title 18 U.S. Code—The Racketeering Act	$1.743M

(ASSESS DAMAGES FOR EACH CLAIM SEPARATELY; VERDICT WILL NOT BE TOTALED)

KENNETH B. LEIGHTON, JR.

Count	*Compensatory Damages*
I. Fraud	$ -0-
II. Violation of California Business & Professions Code Section 17200, Unfair Competition	$1.743M
III. Interference With Prospective Business Advantage	$1.743M
IV. Violation of Section 1 of the Sherman Act, Title 15, Resale Price Fixing	$ -0-
V. Violation of Section 2 of the Sherman Act—Monopolizing, Attempting to Monopolize and/or Conspiring to Monopolize	$1.743M
VI. Violation of Section 16600 or 16700 of the California Business & Professions Code—Cartwright Act	$ -0-
VII. Violation of Section 1962, Title 18 U.S. Code—The Racketeering Act	$1.743M

(ASSESS DAMAGES FOR EACH CLAIM SEPARATELY; VERDICT WILL NOT BE TOTALED)

DATED: 7/11/88
San Diego, California

/s/ WARREN J. JOHNSON
FOREPERSON OF THE JURY

Case No. 84-1585-E(CM)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SHIRLEY McQUILLAN and LARRY McQUILLAN, individually and dba SORBOTURF ENTERPRISES,
Plaintiffs,

vs.

SORBOTHANE, INC. (aka SORBO, INC.), HAMILTON-KENT MANUFACTURING COMPANY, INC., BTR, INC., SPECTRUM SPORTS, INC., KENNETH M. LEIGHTON and KENNETH B. LEIGHTON, JR.,
Defendants.

JUDGMENT

(Filed August 10, 1988;
Entered August 12, 1988)

NOTE: The Judgment Entry of the United States District Court is printed in the Petition for Writ of Certiorari at page A29.

Civil No. 84-1585-E(CM)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SHIRLEY McQUILLAN and LARRY McQUILLAN, dba SORBOTURF ENTERPRISES,
Plaintiffs,

v.

SORBOTHANE, INC., aka SORBO, INC.; HAMILTON-KENT MFG. COMPANY, INC.; BTR, INC.; SPECTRUM SPORTS, INC.; KENNETH M. LEIGHTON; and KENNETH B. LEIGHTON, JR.;
Defendants.

MEMORANDUM DECISION

(Dated December 19, 1988)

BACKGROUND

This is a case against multiple defendants brought by plaintiffs Shirley McQuillan and her husband, Larry, alleging that their exclusive distributorship for the product Sorbothane was wrongfully terminated. Sorbothane is a patented polymer material valued for its shock absorbent tendencies. Most notable among its uses is its cushioning effect in athletic shoes.

Plaintiffs' complaint alleged violations of state and federal antitrust and racketeering laws, as well as asserting common law contract and tort claims. After an eight-week trial ending on July 11, 1988, the jury found all defendants liable on each and every claim of relief,

with the exception of defendants Spectrum Sports and Kenneth B. Leighton, who were found liable on all but three claims of relief. A jury award of $1,743,000 was rendered on all claims. A punitive damage jury award of $500,000 was later waived by the plaintiffs.

Defendants now move for a judgment notwithstanding the verdict or, in the alternative, for a new trial. Plaintiffs move the court to award attorney's fees, prejudgment interest, and to retax costs.

I.

JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) OR FOR NEW TRIAL

Defendants move for a JNOV or, in the alternative, a new trial. Essentially, defendants question the sufficiency of proof on all of the plaintiff's claims, as well as question the amount and form of the damage verdict and certain evidentiary rulings made by this court.

A motion for a JNOV focuses on the sufficiency of the evidence. The standard for granting a JNOV is the same legal test as for a directed verdict. *Fountila v. Carter*, 571 F.2d 487, 489-90 (9th Cir. 1978). In making a determination on a JNOV, the court considers "all evidence in the light most favorable to the non-moving party and draw[s] all reasonable inferences in favor of that party." *Twin City Fire Ins. v. Philadelphia Life Ins. Co.*, 795 F.2d 1417, 1423 (9th Cir. 1986). A JNOV "is not proper if there is substantial evidence to support a verdict for the non-moving party." *Id.* Further, such motions should be cautiously and sparingly granted as there must be a minimum of interference with the jury. *Walker v. KFC Corp.*, 515 F. Supp. 612, 616 (S.D. Ca.

1981), *aff'd in part and rev'd in part*, 728 F.2d 1215 (9th Cir. 1984), *citing* 9 Wright & Miller, *Federal Practice and Procedure*, §2524 (1971).

"A party may secure a JNOV only 'in accordance with its motion for a directed verdict.'" *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1429 (9th Cir. 1986), *quoting* Fed. R. Civ. P. 50(b). A directed verdict motion can therefore serve as a prerequisite to a JNOV "only if it includes the specific grounds asserted in the JNOV motion." *Id.* at 1429. *See also* 9 Wright & Miller, *Federal Practice and Procedure*, §2537 (1971).

In contrast, a motion for new trial does not test the legal sufficiency of the evidence adduced at trial by the prevailing party. *Walker*, 515 F. Supp. at 619. Instead, it may be granted by the court "if in its opinion, the jury's verdict was clearly contrary to the weight of the evidence." *William Inglis, Etc. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1982), *cert. denied*, 459 U.S. 825 (1982).

The instant case involved a lengthy and complex trial. Both sides submitted extensive testimony and documentary evidence in support of their positions. This court has fully considered the papers submitted on the issues, as well as the argument of counsel; however, it declines to substitute its judgment for that of the jury. The parties received a fair and impartial trial, and the record in this case reasonably supports the jury's verdict. Accordingly, the court denies defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a new trial.

II.

ATTORNEYS' FEES

Section 4 of the Clayton Act, 15 U.S.C. §15, allows a successful treble damage plaintiff to recover reasonable attorneys' fees as costs of suit. The purpose of the attorneys' fees provision is to insulate treble damage recovery from large expenditures for legal fees. *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1312 (9th Cir. 1982), *cert. denied*, 459 U.S. 1009 (1982). *Accord Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 663 (7th Cir. 1985). "An award of attorney's fees as part of the cost of a successful antitrust suit is mandatory." *Twin City Sportservice*, 676 F.2d at 1312.

Similarly, the Racketeer Influenced and Corrupt Organizations Act (RICO) permits the successful plaintiff in a civil RICO action to recover reasonable attorneys' fees as a part of the costs of suit. 18 U.S.C. §1964(c). The same applies under section 16750(a) of the California Business and Professions Code, the California Cartwright Act.

" 'The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" *Pennsylvania v. Delaware Valley Citizens' Council (Delaware I)*, 106 S. Ct. 3088, 3097 (1986), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This establishes a lodestar figure. Additionally, a district court may adjust the fee upward or downward based upon the factors identified in *Kerr v. Screen Actors Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975),

cert. denied, 425 U.S. 951 (1976) (adopting twelve factors set forth in *Johnson v. Georgia Statistics Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).[1]

However in *Delaware I*, the Supreme Court held that many of the *Kerr* factors " 'are subsumed within the initial calculation of the lodestar amount.' " 106 S. Ct. at 3098, *citing Blum v. Stenson*, 465 U.S. 886, 898-900 (1984). The Court did not preclude upward adjustments of the lodestar, although it noted that such modifications are proper only in " 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Id., citing Blum*, 465 U.S. at 898-901. Therefore, there is a strong presumption that the lodestar amount represents a reasonable fee. *Id.* at 3098.

Plaintiffs prevailed on each of their claims for relief predicated on RICO and the federal and state antitrust laws against each of the defendants. Accordingly, they now seek attorneys' fees of $1,759,969. This includes a lodestar amount of $1,185,927 reflecting 9,008.4 hours as of September 19, 1988 at an average billing rate of $130.94.[2] Additionally, plaintiffs seek an enhancement

[1] Those factors include: 1) the time and labor required, 2) the novelty and difficulty of the questions involved, 3) the skill requisite to perform the legal service properly, 4) the preclusion of other employment by the attorney due to acceptance of the case, 5) the customary fee, 6) whether the fee is fixed or contingent, 7) time limitations imposed by the client or the circumstances, 8) the amount involved and the results obtained, 9) the experience, reputation, and ability of the attorneys, 10) the "undesirability" of the case, 11) the nature and length of the professional relationship with the client, and 12) awards in similar cases.

[2] This court adopts the plaintiffs' average billing rate of $130.94 as a reasonable hourly rate. *See* Verified Application for an Award of Attorneys' Fees, Declaration of James F. Stiven, page 8, ¶11.

for delay in payment of $137,358, and an enhancement of thirty-three percent, $436,684 for the risk of nonpayment.

In examining the lodestar, this court may consider only the time spent in prosecuting those claims supporting the imposition of attorneys' fees. *See, e.g., Twin City Sportservice*, 676 F.2d at 1316. Thus, time devoted to work that is duplicative or connected to claims or activities unrelated to the successful recovery of those claims supporting attorneys' fees may be excluded. *Id. Accord, In re Equity Funding Corp. of America Securities*, 438 F. Supp. 1303, 1328 (C.D. Cal. 1977).

Further, it is plaintiff's burden to establish the amount of compensable attorney time. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc*, 776 F.2d 646, 650 (7th Cir. 1985). Vague or insufficient documentation of hours is not compensable. *Exhibitors' Service, Inc. v. American Multi-Cinema*, 583 F. Supp. 1186, 1193 (C.D. Cal. 1984); *In re Equity Funding*, 438 F. Supp. at 1327.

Defendants have raised numerous objections to plaintiffs' lodestar amount. They include objections to the pendent state claims, duplicate time, and inconsistent or insufficient documentation. The BTR defendants in a Supplemental Memoranda filed October 18, 1988 have detailed amounts that they consider to be appropriate deductions as to these categories. This court has fully considered those objections which it considers to be reasonable and grounded in case law and, consequently, applies a deduction of $273,894.50 to

plaintiffs' requested lodestar amount.[3] This provides for a lodestar amount of $912,032.50 reflecting 6,965.3 hours at the average hourly billing rate of $130.94.

Lastly, as noted above, plaintiffs seek enhancements totaling $574,042 for the delay in payment and for the risk of nonpayment. *See Pennsylvania v. Delaware Valley Citizens' Council (Delaware II)*, 107 S. Ct. 3078 (1987) (dealing with issue of enhancement for risk of nonpayment). This court determines that an enhancement of the lodestar is inappropriate. It has considered the narrow standards as set out in *Delaware II* to justify enhancement based upon the risk of nonpayment, but finds that the plaintiffs have not met their burden in meeting those standards.

Further, this conclusion acknowledges the *Delaware I* decision noting the "strong presumption" that the lodestar amount represents a reasonable fee, and that enhancements are to be given only in "rare" or "exceptional" circumstances. 106 S. Ct. at 3098. Limiting attorneys' fees in this manner is neither unfair nor unjust to the plaintiffs or plaintiffs' attorneys, instead it is consistent with the rationale behind fee-shifting statutes, including those in the instant case. *Delaware I*, 106 S. Ct. at 3098-99. Accordingly, this court finds that plaintiffs are entitled to a reasonable fee award of $912,032.50.

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[3] This total includes deductions of $164,362.50 for pendent state claims, $11,812 for duplicative time, and $97,720.00 reflecting inconsistent or insufficient entries. Supplemental Memorandum of Defendants Sorbothane, Inc., Hamilton-Kent Manufacturing Company, Inc., BTR, Inc., and Kenneth M. Leighton Re: Plaintiffs' Application for Attorneys' Fees, p. 8, n.5.

III.

PREJUDGMENT INTEREST

A district court may award prejudgment interest on compensatory damages in order to make an injured party whole. *American Timber & Trading v. First Nat. Bank of OR.*, 690 F.2d 781, 784 (9th Cir. 1982), *citing United States v. Cal. State Bd. of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981). An award of prejudgment interest in a case is left to the sound discretion of the trial court. *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982). It is this court's view that plaintiffs have received full and complete recovery for their alleged injury and, therefore, declines to award prejudgment interest.

IV.

RETAX COSTS

This court may review the clerk's assessment of costs *de novo* and "to decide the cost question himself" by exercising its own discretion. *Farmer v. Arabian-American Oil Co.*, 379 U.S. 227 (1964); *Chavez v. Tempe U. Hight Sch. Dist. No. 213*, 565 F.2d 1087 (9th Cir. 1977). Plaintiffs seek to recover the costs of their computer-assisted legal research and costs of copying incident to discovery. The clerk of the court allowed those items properly chargeable as costs. Plaintiffs' motion to retax costs is denied.

V.

CONCLUSION

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing, and for the reasons set forth herein, the court hereby denies defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a new trial. Additionally, the court grants plaintiffs' motion for attorneys' fees in the amount of $912,032.50. Plaintiffs' motions for prejudgment interest and to retax costs are denied.

DATED: December 19, 1988.

/s/ WILLIAM B. ENRIGHT
WILLIAM B. ENRIGHT, *Judge*
United States District Court

Copies to:

Plaintiffs

Defendants

Civil No. 84-1585-E(CM)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SHIRLEY McQUILLAN and LARRY McQUILLAN, dba SORBOTURF ENTERPRISES,
Plaintiffs,

v.

SORBOTHANE, INC., aka SORBO, INC.; HAMILTON-KENT MFG. COMPANY, INC.; BTR, INC.; SPECTRUM SPORTS, INC.; KENNETH M. LEIGHTON; and KENNETH B. LEIGHTON, JR.;
Defendants.

ORDER

(Dated December 19, 1988)

Pursuant to this court's Memorandum Decision dated December 19, 1988, defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a new trial, is denied. Additionally, the court grants plaintiffs' motion for attorneys' fees in the amount of $912,032.50. Plaintiffs' motions for prejudgment interest and to retax costs are denied.

DATED: December 19, 1988.

/s/ WILLIAM B. ENRIGHT
WILLIAM B. ENRIGHT, *Judge*
United States District Court

Copies to:
Plaintiffs
Defendants

Case No. 84-1585-E(CM)

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

NOTICE OF APPEAL OF SPECTRUM SPORTS, INC. AND KENNETH B. LEIGHTON

(Filed January 13, 1989)

Notice is hereby given that defendants, Spectrum Sports, Inc. and Kenneth B. Leighton, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on the August 12, 1988, attached hereto as Exhibit A, and the Order entered in this action on December 29, 1988, attached hereto as Exhibit B.

Respectfully submitted,

SCHNEIDER, SMELTZ, HUSTON & RANNEY
By: /s/ JAMES D. VAIL
JAMES D. VAIL
SHARON L. SOBOL
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Case No. 89-55326, 89-55329, 89-55332

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHIRLEY McQUILLAN, *et al.*,
Plaintiffs/Appellees/Cross-Appellants,

vs.

SORBOTHANE, INC., *et al.*,
Defendants/Appellants/Cross-Appellees.

MEMORANDUM

(Filed July 3, 1990)

NOTE: The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is printed in the Petition for Writ of Certiorari at page A1.

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(Consolidated)

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vs.

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ORDER

(Filed April 1, 1991)

NOTE: The Order of the United States Court of Appeals for the Ninth Circuit Amending Memorandum Decision and Denying Petition for Rehearing is printed in the Petition for Writ of Certiorari at page A32.

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No. 91-10

IN THE

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC., *et al.*,
Petitioners,

vs.

SHIRLEY MCQUILLAN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a manufacturer's distributor expressly absolved of violating section 1 of the Sherman Act can be found liable for attempting to monopolize without any evidence of market power or specific intent solely by virtue of a unique Ninth Circuit rule?

LIST OF PARTIES

The Petitioners are Spectrum Sports, Inc. and Kenneth B. Leighton.

Respondents are Shirley McQuillan and Larry McQuillan who sometimes did business as Sorboturf Enterprises.

The following individual and companies were co-defendants in the case below. They petitioned this Court for a writ of certiorari, were assigned Case No. 91-32, and are affected by the outcome of this case:

BTR, Inc., which, at all relevant times, owned, directly or indirectly, Hamilton-Kent Manufacturing Co., Inc. and Sorbothane, Inc.

Hamilton-Kent Manufacturing Company, Inc. was purchased by a BTR, Inc. subsidiary in 1978.

Sorbothane, Inc., an indirect, wholly-owned subsidiary of BTR, Inc., was formed in 1982 to take over Hamilton-Kent Manufacturing Co.'s Sorbothane business.

Kenneth M. Leighton is Kenneth B. Leighton's father. He served as President of Hamilton-Kent Manufacturing Co. and then Sorbothane, Inc. at all relevant times.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 11

ARGUMENT 13

I. The Court Should Strike Down the *Lessig* Rule Because Inferring a Dangerous Probability of Success and Specific Intent from Conduct Improperly Punishes a Business for Conduct Which Does Not Actually or Potentially Harm Competition ... 13

II. The Court Should Strike Down the *Lessig* Rule Because Its Elimination of the Dangerous Probability Element of an Attempt to Monopolize Claim Encourages Plaintiffs to Initiate Antitrust Actions Where Competition Is Not Jeopardized 20

III. The Court Should Strike Down the *Lessig* Rule Because It Fails to Recognize the Different Treatment of Unilateral Conduct and Concerted Action Inherent in the Antitrust Laws 24

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

A.H. Cox v. Star Mach. Co., 653 F.2d 1302 (9th Cir. 1981) 20

American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569 (11th Cir. 1985) 18

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 16,22

Atlantic Richfield Co. v. U.S.A. Petroleum Co., 495 U.S. 328 (1990) 20

Bright v. Moss Ambulance Serv., 824 F.2d 819 (10th Cir. 1987) 18

CVD, Inc. v. Raytheon Corp., 769 F.2d 842 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) 17

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 20,24,25,26

FMC Corp. v. Manitowoc Co., 654 F. Supp. 915 (N.D. Ill.), *aff'd*, 835 F.2d 1411 (Fed. Cir. 1987) 18

General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795 (8th Cir. 1987) 18

Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3d Cir. 1978) 18

Janich Bros. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) 11,15

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Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982) 18

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) ..... *passim*

Lorain Journal Co. v. United States, 342 U.S. 143 (1951) 13,17

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Monsanto Co. v. Spray-Rite Serv. Co., 465 U.S. 752 (1984) 24

Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) 18

Neumann v. Reinforced Earth Co., 786 F.2d 424 (D.C. Cir.), *cert. denied*, 479 U.S. 851 (1986) 18

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Swift & Co. v. United States, 196 U.S. 375 (1905) 11,13

United States v. Colgate & Co., 250 U.S. 300 (1919) 21

United States v. Dairymen, Inc., 660 F.2d 192, 194 (6th Cir. 1981) 18

United States v. Griffith, 334 U.S. 100 (1948) 13

Walker Process Equip., Inc. v. Food Mach. and Chem. Corp., 382 U.S. 172 (1965) 14

White Bag Co. v. International Paper Co., 579 F.2d 1384 (4th Cir. 1974) 18

Federal Statutes

Sherman Act, 15 U.S.C. §1 4,17,21,24,25

Sherman Act, 15 U.S.C. §2 ..... *passim*

RICO Act, 18 U.S.C. §1962 4

28 U.S.C. §1254(1) 2

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No. 91-10

IN THE

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October Term, 1991

SPECTRUM SPORTS, INC., *et al.*,
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vs.

SHIRLEY MCQUILLAN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The memorandum decision of the court of appeals is not reported and is found at page A1 of the Appendix to the Petition for Writ of Certiorari. ("Pet. App."). The judgment of the district court is not reported and is found at Pet. App. A29.

JURISDICTION

The memorandum decision of the court of appeals was entered July 3, 1990. Pet. App. A1. A petition for rehearing with a suggestion for rehearing *en banc* was denied on April 1, 1991. Pet. App. A32. The petition for a writ of certiorari was filed on June 28, 1991, and was granted on March 30, 1992. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This suit arises from the termination of Respondents' alleged right to distribute products made from a shock absorbent material known as Sorbothane. At trial, a jury exonerated Petitioners on a price fixing claim brought under section 1 of the Sherman Act (J. A. 408), but awarded damages to Respondents upon finding Petitioners violated section 2 of the Sherman Act.[1] J. A. 410. The trial court trebled that damage award and also awarded attorneys' fees and costs. Pet. App. A31. On appeal, Petitioners argued, among other things, that sufficient evidence did not exist for the jury to find Petitioners liable for "attempting to monopolize" in violation of the Sherman Act because

(a) there was no evidence of Petitioners' share of any relevant market,

(b) there was no evidence of Petitioners' specific intent to monopolize,

(c) the jury exonerated Petitioners from the claim of a *per se* violation of section 1, and

(d) no evidence of clearly predatory conduct by Petitioners was produced.

The Court of Appeals for the Ninth Circuit, nonetheless, affirmed the trial court's judgment based solely on the attempt to monopolize claim. It expressly declined to review the other issues presented. Pet. App. A28. The court of appeals subsequently denied Petitioners' petition for rehearing with a suggestion for rehearing *en banc*.

[1] The jury also exonerated Petitioners from claims for violation of the California antitrust statute (J. A. 411), fraud (J. A. 398), and violation of 18 U.S.C. §1962(a) (RICO) (J. A. 412), and found them liable for interference with prospective business advantage (J. A. 406), unfair competition (J. A. 405), and violation of 18 U.S.C. §§1962(b), (c) and (d) (RICO) (J. A. 413-15).

Sorbothane is a visco-elastic polymer[2] primarily incorporated into products as a shock-absorbing material. Sorbothane entered the commercial market in the United States when BTR, Inc. ("BTR") obtained the right to manufacture and sell Sorbothane. BTR is a holding company which at all relevant times owned, directly or indirectly, Hamilton-Kent Manufacturing Company, Inc. ("H-K") and Sorbothane, Inc. The involvement of these companies and their employees with the Petitioners and Respondents is described below.

1. H-K's Good-Faith Selection of Regional Distributors.

On August 20, 1980, H-K obtained a sub-license to manufacture Sorbothane products for three years. J. A. 298. H-K first tried using Sorbothane in horseshoe pads. In fact, Respondent Shirley McQuillan ("McQuillan") was involved in the early development of Sorbothane for equestrian uses because her extensive work with horses exposed her to the potential benefits of shock-absorbing pads on horses. R. 2442. H-K subsequently explored using Sorbothane as a shock-absorbing insole in athletic shoes.

In late May or early June, 1981, after an unsuccessful attempt to market Sorbothane through a national distributor, Kenneth M. Leighton ("Leighton Senior"), H-K's President, asked Laurene Heinsohn ("Heinsohn"), a recent college graduate and then marketing manager at H-K, to prepare a marketing plan for Sorbothane insoles. J. A. 193, 225. After completing her analysis, Heinsohn presented a plan that called for the creation of regional distributors. She initially identified McQuillan, McQuillan's father Myron McCone,

[2] A visco-elastic polymer is a solid which absorbs energy like a liquid, *i.e.*, it dissipates energy. R. 1670.

Arnold Lund, and Martin Vogel as distributors. R. 1069-70. Shortly thereafter, she added Kenneth B. Leighton ("Leighton Junior") as the fifth distributor.[3] R. 794.

Heinsohn selected these individuals because she believed them to be the only ones available, interested, and ready to begin selling Sorbothane products. J. A. 194. The regional distributors were assigned exclusive territories and did not compete with one another. Plaintiffs' Exhibit 4. The regional distributors did compete with marketers of other products containing different shock absorbing materials.[4]

Heinsohn eventually realized her selection of the distributors was done without adequate research. She admitted she failed to do a proper investigation (J. A. 195), made no credit checks, and was ignorant of the distributors' marketing skills and business backgrounds. R. 793. However, Heinsohn's undisputed testimony was that her decision was made in good faith—not part of any illicit plan—and the selections resulted from her own inexperience. J. A. 195.

2. H-K Considers National Distributors.

In early January, 1982, H-K appointed IEM Orthopedics ("IEM") as the national medical distributor of Sorbothane products. R. 3760. In the last week of January, 1982, a meeting was held at which John Burne

[3] Leighton Junior and Michael Silvestro subsequently incorporated Ohio Cushions, Inc. which was renamed Spectrum Sports, Inc. ("Spectrum").

[4] Heinsohn, a witness hostile to Petitioners, testified that Sorbothane competed nationally with Spenco and with other products regionally. R. 973. Leighton Junior corroborated the existence of interbrand competition (R. 2908), as did Richard Olsen, an expert witness who testified for the defense. R. 3344-45.

("Burne"), the owner of IEM, Heinsohn, Leighton Senior, and Leighton Junior were present. Leighton Junior attended the meeting at the request of Heinsohn.

The meeting addressed the distribution of Sorbothane products, particularly in the medical field. J. A. 346-47, R. 2866. Burne proposed that H-K's regional distribution system be replaced by national distributors for each of the Sorbothane product groups; specifically, IEM would be the national distributor for medical products, Spectrum the national distributor for athletic products, Myron McCone, the national distributor for industrial products, and McQuillan the national distributor for equestrian products.[5] J. A. 179-80. According to Burne's proposal, the other distributors would maintain their territories, but would operate under Spectrum's supervision. J. A. 181-82. Heinsohn endorsed Burne's proposal because once IEM had been selected as a national distributor for medical products, national distributors for other Sorbothane products made good business sense to her. R. 1083. Heinsohn also was enthusiastic about selecting Spectrum as the national distributor of athletic products reasoning that Leighton Junior had the most business sense of all the regional distributors and, therefore, Spectrum would purchase more Sorbothane from H-K. R. 1084.

[5] Leighton Junior had openly expressed to Heinsohn his goal of becoming a national distributor of Sorbothane athletic products. Plaintiffs argued at trial and on appeal that Leighton Junior intended to achieve that goal by some nefarious plan. However, the only evidence on this issue—offered by plaintiffs' own witness, Heinsohn,—failed to support this contention and, instead, confirmed that Leighton told Heinsohn he planned to achieve his goal by outperforming the other distributors. R. 798, 1074. Leighton Junior's goal was no different than McQuillan's goal to be the national distributor for equestrian products.

3. The Chicago Meeting.

Heinsohn presented this proposal to structure national distributors to H-K's regional distributors at a sales meeting in Chicago on February 10, 1982. J. A. 149. She tried many ways to persuade them to accept this plan, one of which was to exaggerate the amount of Sorbothane purchased by Spectrum so as to convince the other distributors Spectrum was the superior distributor. J. A. 183. The uncontested evidence established Heinsohn took this approach without Leighton Junior's or Spectrum's knowledge or prompting. J. A. 184. Leighton Junior did not learn of Heinsohn's ploy until a few days after the meeting, by which time the other distributors had already rejected her plan. J. A. 226-27. Thereafter, the regional distribution system remained in place. J. A. 184.

4. Spectrum's Arrangement with Lund and Vogel.

In early March, 1982, following negotiations initiated by Lund, Spectrum purchased Lund's distributorship in the northwest region. J. A. 227. In the same month, H-K terminated Vogel because of poor performance. R. 1518. By the end of March, 1982, Spectrum had arranged for both Vogel and Lund to act as sales representatives for Spectrum. J. A. 228. Under these arrangements, Spectrum paid each of them commissions on sales made in their former territories. Vogel and Lund's commission rate was 30%—much more than the 10% Spectrum ordinarily paid its sales representatives. J. A. 229. This premium was designed to compensate Lund and Vogel for their work in developing their former territories. J. A. 228-30. At the end of March, 1982, there were three regional distributors—Respondents, McQuillan's father, and Spectrum.

In April, 1982, Leighton Senior told McQuillan he would consider a proposal from her to become the national distributor for equestrian products. R. 1281. At this time, Respondents were working to produce a marketable horseshoe pad. R. 883. Leighton Senior suggested to McQuillan that she sell her athletic distributorship so she could concentrate on equestrian products, her area of expertise. R. 885, 1281.

In May, 1982, McQuillan traveled to H-K's headquarters and proposed to H-K that she become the national distributor of equestrian products. Leighton Junior was neither aware of, nor present at, that meeting. R. 888. Leighton Senior foresaw great potential in the equestrian market, but did not believe McQuillan had the resources or capacity to serve both as a national distributor of equestrian products and as a regional distributor of athletic products. R. 1281. Consequently, Leighton Senior suggested to McQuillan that she speak with Spectrum concerning the sale of her athletic distributorship. R. 1281.

5. Spectrum's Negotiations with McQuillan.

McQuillan did, in fact, approach Spectrum about selling her distributorship. R. 890. Spectrum offered to pay McQuillan a percentage of gross proceeds for her distributorship, using the same formula it used to buy Lund's distributorship. J. A. 230. McQuillan preferred a lump sum purchase and proposed to sell her business to Spectrum for $400,000. Spectrum rejected that proposal. J. A. 231-32. Later, after reviewing McQuillan's financial statements, Spectrum offered McQuillan $48,000. J. A. 232. She rejected that offer. During these exasperating negotiations, Leighton Junior made unflattering remarks concerning McQuillan's ability to operate a business. J. A. 158-59.

By August, 1982, negotiations with Spectrum for the sale of Respondents' distributorship had ended. J. A. 232. Thereafter, Respondents had very little contact with Leighton Junior and Spectrum. J. A. 234.

Sorbothane, Inc.[6] terminated McQuillan's distributorship in August 1983 when Leighton Senior discovered that, despite McQuillan's denials, she had formed a new business, Equistep, to distribute a Goodyear product that competed directly with Sorbothane, Inc. J. A. 165-71. Spectrum and Leighton Junior were not consulted about, had no prior knowledge of, and did not participate in the decision to terminate Respondents' distributorship. J. A. 236.

[6] In 1982, BTR formed Sorbo, Inc., an indirect, wholly-owned subsidiary, to take over H-K's Sorbothane business. Leighton Senior became the President of Sorbo, Inc., which later changed its name to Sorbothane, Inc.

SUMMARY OF ARGUMENT

A successful attempt to monopolize claim under section 2 of the Sherman Act requires the plaintiff to demonstrate anticompetitive, or predatory, conduct, specific intent to monopolize, and a dangerous probability of success. *Swift & Co. v. United States*, 196 U.S. 375 (1905). The Court of Appeals for the Ninth Circuit, however, dispenses with two of the three elements of this Court's standard and imposes liability on a defendant upon a showing of merely unfair, or predatory, conduct. *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

The *Lessig* rule's current formulation permits the element of dangerous probability of success to be inferred from evidence of specific intent to monopolize which may, in turn, be inferred from evidence of anticompetitive, or predatory, conduct. *Janich Bros. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). Such a rule obviates the need for antitrust plaintiffs to define the relevant market in which defendants operate and disregards the issue of potential harm to that market.

Not only does the *Lessig* rule dispense with the dangerous probability requirement and proof of the affected relevant market, but it dispenses with the specific intent to monopolize requirement. Under this rule, unfair conduct, standing alone, constitutes a violation of the antitrust laws.

In this particular case, adherence to the *Lessig* rule allowed the jury to find a violation of section 2 based solely on Petitioners' "unfair" conduct of making unkind comments to Respondents. In short, adherence to the *Lessig* rule allowed what was, at most, an insult to be transformed into an antitrust violation because a full inquiry into Petitioners' specific intent to monopolize and a dangerous probability of their success in monopolizing a relevant market was not required.

Such a relaxed analysis ignores almost a century of antitrust law which distinguishes between concerted activity and unilateral activity. Application of the *Lessig* rule punishes conduct by single firms without inquiring into the effect of the conduct in the relevant market. Thus, the *Lessig* rule permitted Respondents to recover treble damages and attorney fees for conduct which could not harm competition or consumers.

ARGUMENT

I. THE COURT SHOULD STRIKE DOWN THE *LESSIG* RULE BECAUSE INFERRING A DANGEROUS PROBABILITY OF SUCCESS AND SPECIFIC INTENT FROM CONDUCT IMPROPERLY PUNISHES A BUSINESS FOR CONDUCT WHICH DOES NOT ACTUALLY OR POTENTIALLY HARM COMPETITION.

The rule announced in *Lessig v. Tidewater Oil Company*, 827 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) improperly punishes a business by imposing treble damages in cases where competition is not jeopardized.

This Court has long required the plaintiff in an attempt to monopolize case to prove: (1) predatory, or anticompetitive, conduct; (2) specific intent to monopolize; and (3) a dangerous probability of success. *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951); *United States v. Griffith*, 334 U.S. 100, 105-106 (1948); *Swift & Co. v. United States*, 196 U.S. 375 (1905). Justice Holmes explained the foundation for the Court's requirement of all three elements:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring that result to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.

Swift & Co., 196 U.S. at 396 (citation omitted).

The Court emphasized the indispensibility of the "dangerous probability of success" element to an attempt to monopolize claim in *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965). In *Walker Process*, the defendant, through a counterclaim, asserted plaintiff's fraudulent acquisition and maintenance of a patent constituted an attempt to monopolize in violation of section 2 of the Sherman Act. The court rejected that claim, holding that the "dangerous probability of success" element requires an analysis of market power. The Court stated:

> To establish monopolization or attempt to monopolize a part of trade or commerce under §2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition.

Id. at 177.

In this case, the court of appeals ignored this Court's rule and affirmed the trial court's judgment, relying solely upon a current version of *Lessig*,[7] a rule peculiar

[7] In *Lessig*, the plaintiff, Paul Lessig, was a Tidewater Oil Co. ("Tidewater") dealer. Tidewater was accused of attempting to fix prices and imposing tying arrangements upon its dealers. The trial court did not give the jury an instruction on attempt to monopolize because insufficient evidence of a dangerous probability of a successful monopolization was presented. On appeal, the Court of Appeals for the Ninth Circuit reversed, holding that a dangerous probability of success is not an element of an attempt to monopolize claim. The court of appeals concluded that if Lessig could demonstrate Tidewater's specific intent to fix prices and to exclude its dealers from access to other suppliers, and that Tidewater took some step in that direction, then Tidewater was liable for an attempt to monopolize under section 2 of the Sherman Act.

to the Ninth Circuit, which provides that dangerous probability of success may be inferred from evidence of specific intent to monopolize which may, in turn, be inferred from evidence of anticompetitive or predatory conduct.[8] *See, e.g., Janich Bros. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). In affirming the trial court judgment, the court of appeals held:

> We are satisfied that if evidence of *unfair* or predatory conduct is presented, it may satisfy both the specific intent and dangerous probability elements of the offense, without any proof of relevant market or the defendant's market power.

Pet. App. A19 (emphasis added).

The *Lessig* rule permits a jury to award antitrust damages without determining the relevant market or the defendant's market power. Worse, it even permits a jury to find a section 2 violation notwithstanding its determination that the defendant lacks significant market power.

The *Lessig* court simply discarded the need for market definition, holding that it is possible for a defendant to attempt to monpolize "'any part' of commerce" even if that "part" does not correspond to a relevant market. *Lessig*, 377 F.2d at 474-75. As a result, a manufacturer with a 1% market share may be found liable for attempting to monopolize by doing nothing more than replacing a distributor of its products.

[8] The trial court, over Petitioners' objection (R. 3917), instructed the jury that

> If the plaintiff has shown that the defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of relevant market or the defendant's marketing [sic] power.

R. 4350.

The flaws of the *Lessig* rule are equally apparent in its application to the present facts. The jury was permitted to find an antitrust violation based only on the fact that one Sorbothane distributor replaced another. The *Lessig* rule permitted the jury to reach this result even though it may have concluded Spectrum lacked market power over the relevant market defined by Defendants' expert as "shock absorbing technology in [the] footwear market[ ]." R. 3344.

The error of the trial court in refusing to instruct the jury regarding the dangerous probability element of an attempt offense was made complete by its failure to require evidence demonstrating Spectrum's specific intent to achieve a monopoly; for it is the specific intent element which is the foundation for the dangerous probability inference.

Lessig requires only that a plaintiff prove anticompetitive, or predatory, conduct. Such a broad-based rule ignores this Court's instruction to lower courts that specific intent to monopolize not be inferred from ambiguous conduct. In *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585 (1985), this Court held that monopolization could not be proved if the defendant's conduct is justified by any legitimate business purpose. This Court approved the trial court's jury instruction:

> In other words, if there were legitimate business reasons for the refusal, then the defendant even if he is found to possess monopoly power in a relevant market, has not violated the law.

Id. at 597.

In an attempt case, intent is an even more critical element than in monopolization. In attempt cases, the Court requires proof of the defendant's specific intent to monopolize. *E.g., Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). Yet, under *Lessig*, intent—specific

or general—need not be proved at all; it becomes a fiction for which other conduct becomes its proxy. A Ninth Circuit jury is not required to determine whether or not potentially ambiguous conduct has a legitimate business purpose.

This case illustrates the harm that results from limiting the analysis in an attempt case to a review of conduct only. In this case, no evidence existed that Petitioners specifically intended to monopolize any market. The jury determined Petitioners did not violate section 1 of the Sherman Act which, under *Lessig* formulations, can form the specific intent basis of the *Lessig* double inference. The only relevant evidence addressing the intent element was Leighton Junior's comment that he sought to earn a national distributorship by outperforming the other regional distributors. Petitioners had virtually no contact with Respondents during the year preceding the termination of Respondents' distributorship. Petitioners did not seek, know of, or participate in Respondents' termination. In this case, Spectrum's perfectly proper intention to become the national Sorbothane distributor for athletic products was, by virtue of the *Lessig* rule, transformed into an illegal intent to monopolize.

Without an independent analysis of the three elements of predatory or anticompetitive conduct, specific intent to monopolize, and a dangerous probability of success, conduct which, at worst, may amount to a business tort, may be deemed an antitrust violation. No other circuit court has adopted the *Lessig* rule; no other circuit permits the imposition of treble damages in cases where competition is not jeopardized.[9]

[9] *See, e.g.*, 1st Cir.: *CVD, Inc. v. Raytheon Corp.*, 769 F.2d 842, 851 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); 2d Cir.: *International Distribution Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 790-791 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987); 3d Cir.:

(Footnote continued on following page.)

In *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2nd Cir.), *cert. denied*, 482 U.S. 915 (1987), the court rejected plaintiff's request that it adopt the *Lessig* rule and held:

> *Eliminating the dangerous probability element from attempted monopolization would have the effect of extending the coverage of section 2 of the Sherman Act to similar behavior already covered by state and federal law.* The Federal Trade Commission Act Section 5, 15 U.S.C. §45 (1982), regulatory statutes and state business tort law all reach anticompetitive behavior by firms that lack market power . . . There is no unmet need calling for judicial expansion of section 2 to reach similar behavior. *See*, 3 Areeda and Turner, Section 833(d) at 341.
>
> Furthermore, any significant reduction in the antitrust plaintiff's burden of proving that the defendant has a dangerous probability of monopolizing the market might discourage the healthy competition that section 2 is intended to nurture. . . .

Id. at 791 (emphasis added).

Judge Bork explained the need for the "dangerous probability element" in *Neumann v. Reinforced Earth Company*, 786 F.2d 424, 428 (D.C. Cir.), *cert. denied*, 479 U.S. 851 (1986):

(Footnote continued from preceding page.)
Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068, 1079 (3d Cir. 1978); 4th Cir.: *White Bag Co. v. International Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974); 5th Cir.: *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 991 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); 6th Cir.: *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); 7th Cir.: *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); 8th Cir.: *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987); 10th Cir.: *Bright v. Moss Ambulance Serv.*, 824 F.2d 819, 824 (10th Cir. 1987); 11th Cir.: *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1579-81 (11th Cir. 1985); D.C. Cir.: *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 428-29 (D.C. Cir.), *cert. denied*, 479 U.S. 851 (1986); Fed. Cir.: *FMC Corp. v. Manitowoc Co.*, 654 F. Supp. 915, 934 (N.D. Ill.), *aff'd*, 835 F.2d 1411 (Fed. Cir. 1987).

> The required showing of "dangerous probability," however may provide a court with some assurance, otherwise lacking, that the bad faith litigation constitutes an anticompetitive act and is not merely legal harassment for personal motives. In the latter case the appropriate action would be one in tort for abuse of process or malicious prosecution, not one invoking the full panoply of the antitrust laws, including recovery of triple damages.

As one legal commentator recognized, the *Lessig* rule's inference upon an inference converts the attempt to monopolize portion of section 2 into a glorified business tort statute.

> As monopoly power itself is measured in terms of a relevant market, so must dangerous probability also be measured. Unless you know where a defendant is heading, you cannot find out how close he is to the destination. Thus, the concept of dangerous probability is only meaningful in the context of relevant market.
>
> * * *
>
> Under the *Lessig* analysis, any business tort may become an attempt to monopolize case. . . . In other words, the *Lessig* approach reeks of over kill.

Don T. Hibner, Jr., *Attempts to Monopolize: A Concept in Search of Analysis*, 34 ABA Antitrust L.J. 165, 171 (1967).

Congress did not authorize or intend treble damage awards for garden-variety business tort claims which affect only the parties to any particular lawsuit.[10] Yet the Ninth Circuit's *Lessig* rule fails to distinguish between business-tort cases and true antitrust violations. As a result, defendants who may be liable for business tort claims get caught in the treble damage net even though their conduct poses no risk to competition.

[10] Congress authorized the award of treble damages for antitrust violations because it wanted to enlist the public "as allies of the government in enforcing the antitrust laws." 51 Cong. Rec. 9073 (1914). The antitrust laws are designed to benefit society as a whole, not individuals.

II. THE COURT SHOULD STRIKE DOWN THE *LESSIG* RULE BECAUSE ITS ELIMINATION OF THE DANGEROUS PROBABILITY ELEMENT OF AN ATTEMPT TO MONOPOLIZE CLAIM ENCOURAGES PLAINTIFFS TO INITIATE ANTITRUST ACTIONS WHERE COMPETITION IS NOT JEOPARDIZED.

The *Lessig* rule's elimination of the "dangerous probability" element not only reduces a plaintiff's burden in attempt cases, but ignores the distinction between harm to competition and harm to competitors. The antitrust laws are not designed to protect competitors, but rather to protect competition. *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328 (1990); *Copperweld v. Independence Tube Corp.*, 467 U.S. 752 (1984). Without having to prove a dangerous probability of harm to competition in an attempt case, a plaintiff governed by the *Lessig* rule need only show harm to a competitor to be entitled to treble damages and attorneys fees.

As Judge (now Justice) Kennedy held, in affirming the summary judgment on a section 2 claim arising from a distributor substitution:

> That one distributor will be hurt when another succeeds in taking its line will be axiomatic in some markets, as it was here, but the intent to cause that result is not itself prohibited by the antitrust laws. The intent proscribed by the antitrust laws lies in the purpose to harm competition in the relevant market, not to harm a particular competitor.

A. H. Cox v. Star Mach. Co., 653 F.2d 1302, 1307 (9th Cir. 1981).

The Second Circuit came to the same conclusion in *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2nd Cir.) (*en banc*), *cert. denied*, 439 U.S. 946 (1978), where it held that the replacement of one distributor by another was not enough to constitute a *per se* violation of section 1 of the Sherman Act.

> It has always been the prerogative of a manufacturer to decide with whom it will deal. See *United States v. Colgate & Co.*, 250 U.S. 300, 39 S. Ct. 465 (1919). Any alleged inducements by Sears to Whirlpool to allow the contract with Oreck to expire may have amounted to tortious interference; but, without some further showing that from this course of conduct there was an anticompetitive effect in the vacuum cleaner industry as a whole, it is inconsistent with the sanctity of contractual arrangements to allow the antitrust laws to inject a provision into the agreement which would require Whirlpool to renew Oreck's distributorship for as long as it is able to compete successfully with Sears. In this case, therefore, something more than an agreement between Whirlpool and Sears to eliminate Oreck must be shown. The agreement becomes violative of Section 1 of the Sherman Act only if it is *anticompetitive in purpose or effect*—in sum, it must be tested by the rule of reason.

Id. at 133 (emphasis in original).

Just as substitution of distributors does not *per se* violate section 1, such a substitution does not violate section 2 unless there is potential harm to competition and the intent to inflict such harm.

Handler and Steuer reviewed the report of The National Commission for the Review of Antitrust Laws and Procedures, specifically analyzing the chapter devoted to attempted monopolization, and concluded competition is rarely harmed by conduct forming the basis of attempt claims:

The Commission, of course, focused its attention less upon those defendants whose market share created an actual "risk" of monopoly than upon those defendants that exhibited conduct so predatory and vicious that—regardless of market share—their activities should be prohibited. Most of the conduct challenged in attempted monopolization cases, however, is neither predatory nor vicious;

* * *

Judge Morgan in the Fifth Circuit has warned:

> Lest any other former distributors succumb to the temptation of treble damages, we reiterate that it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business.

Milton Handler & Richard M. Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. Pa. L. Rev. 125, 141-143 (1985) (footnotes omitted).

Any inquiry into harm to competition must consider the effect on consumers of the allegedly illegal conduct. As this Court stated in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985):

> The question whether [defendant's] conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on [its competitor]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unncessarily restrictive way.

Id. at 605 (footnote omitted).

Petitioners were not likely to monopolize any market, or for that matter, harm competition in any way. Whether or not Spectrum ever became the national distributor of Sorbothane athletic insoles rather than one of three regional distributors would have no effect whatsoever on competition. Before Respondents' distributorship was terminated, their customers—retailers—had only one source of supply for Sorbothane athletic insoles—Respondents. Respondents were exclusive distributors in the southwestern United States. Petitioners were exclusive distributors in other regions of the United States. After Petitioners replaced Respondents as distributors in the southwest, retailers in the southwest were in the same position; they had one—only one—source of supply for Sorbothane products. Respondents' termination had no effect on competition, yet, under the *Lessig* rule, the jury was not required to even consider the effect on competition or consumers.

III. THE COURT SHOULD STRIKE DOWN THE *LESSIG* RULE BECAUSE IT FAILS TO RECOGNIZE THE DIFFERENT TREATMENT OF UNILATERAL CONDUCT AND CONCERTED ACTION INHERENT IN THE ANTITRUST LAWS.

The Court should reject the *Lessig* analysis because it ignores the distinction between unilateral conduct and concerted action inherent in sections 1 and 2 of the Sherman Act. Proof of the likelihood of actual monopolization is not required in certain section 1 cases because of the great concern associated with concerted activity. Section 2 cases, however, which address single-firm activity, require a more cautious approach before assessing damages. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984); *Monsanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. 752, 761 (1984).

In *Copperweld*, this Court stated:

> The conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging

> unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepeneur.

Copperweld Corp., 467 U.S. at 767-68 (footnote omitted).

The *Copperweld* Court went on to distinguish section 1 and section 2 claims.

> Concerted activity subject to §1 is judged more sternly than unilateral activity under §2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. . . .
>
> The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision making that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.

Id. at 768-69.

The *Lessig* rule generally, and particularly as applied in this case, permits juries to treat section 2 cases as if they were section 1 cases—inherently fraught with anticompetitive risk—even though no conspiracy or concerted activity exists.

Justice White, in his dissent from a denial of a petition for certiorari, explained the need for different levels of scrutiny, and why the *Lessig* rule ignores that distinction:

Sections 1 and 2 of the Sherman Act are directed to different sorts of threats to competition in our economy. Section 1 proscribes concerted action—contracts, combinations, and conspiracies in restraint of trade. Such concerted action is so inherently threatening to competition that in certain instances it is forbidden without regard to whether it has actually damaged competition in a particular market. Section 2 regulates unilateral conduct by outlawing monopolization and attempted monopolization. Because unilateral conduct is far less likely than concerted action to pose a threat to competition, "[t]he conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

Because the *Lessig* doctrine allows a violation of §2 to be found on the basis of a per se violation of §1, without regard to the effect of a defendant's conduct in any relevant market, it appears to be in tension with these principles.

Mobil Oil Corp. v. Blanton, 471 U.S. 1007 (White, *J.*, dissenting), *reh'g denied*, 471 U.S. 1120 (1985).

Legal commentators also believe the *Lessig* rule fails to distinguish between unilateral conduct and concerted action and thus improperly punishes a business which does not harm competition. Professor Kintner observes:

> *Lessig* and the less radical departures from the dangerous probability requirement discussed above would profoundly change the attempt to monopolize offense if those departures were eventually adopted by more courts. The plaintiff's burden of proof would be substantially eased because definition and evaluation of the relevant product and geographic markets would no longer be required. The attempt offense would be significantly expanded to encompass at least some unilateral anticompetitive

> conduct by actors lacking substantial market power. These approaches effectively abandon the traditional views of the attempt offense, which links attempts with monopolization.

Earl W. Kinter, *Federal Antitrust Laws*, §13.4 at 430 (1980).

Professors Areeda and Turner join in the criticism of *Lessig* pointing out that even where proof exists of a *per se* violation of section 1, attempted monopolization cannot be established without identifying a market that may be monopolized. Phillip Areeda & Donald F. Turner, *Antitrust Law*, Section 832(1)(a) (1991 Supp.).

A failure to strike down the *Lessig* rule endorses the subsistence of inefficient businesses in the marketplace, and encourages the use of the antitrust laws to punish efficient businesses. Spectrum is simply a capable business entity. Its abilities, when combined with Respondents' deceit, resulted in Spectrum being the surviving distributor. These events do not rise to the level of a section 2 claim.

CONCLUSION

For the reasons herein, Petitioners Spectrum Sports, Inc. and Kenneth B. Leighton respectfully request this Court to reverse the decision of the court of appeals.

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In The

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC. and
KENNETH B. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

In deciding a claim for attempt to monopolize under section 2 of the Sherman Act, may the jury be permitted to infer the dangerous probability of success element from either or both (a) conduct which plainly injures competition and has no procompetitive justification, or (b) direct proof of injury to competition?

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Procedural Background 3

B. Factual Background 4

1. BTG Grants BTR a Non-Exclusive License for Manufacture and Distribution of Sorbothane Worldwide 4

2. Kenneth M. Leighton Brings Sorbothane to United States 4

3. McQuillan Becomes a Sorbothane Distributor 5

4. HK Maintains Sorbothane Prices with Price Fixing Agreements 6

5. Jr, Sr and John Burne Agree to Terminate Regional Distributors to Maintain High Prices 8

6. HK Enters Into a "Harmonious Marketing Agreement" With Leyland 10

7. BTR Attempts to Persuade BTG to Make BTR's Sorbothane License Exclusive 11

8. HK Terminates McQuillan's Distributorship 12

SUMMARY OF ARGUMENT 14

TABLE OF CONTENTS – Continued

Page

1. The Jury Instructions For Attempt to Monopolize Were Correct 14

2. Should the Court Find Reversible Error In the Jury Instructions, It Should Remand the Section 2 Verdict For Consideration By the Ninth Circuit and Dismiss the Related Petition 16

ARGUMENT 17

1. Spectrum Was Not "Exonerated" of the Conduct Supporting the Section 2 Verdict 17

2. Permitting The Jury to Infer, Under Certain Circumstances, Dangerous Probability of Monopolization, Is Consistent With Well Established Law Under Section 1 and the Purposes of the Sherman Act 19

a. Sherman Act Sections 1 and 2 Both Require A Showing of Injury To Competition, Ordinarily Based on Market Power 19

b. Injury To Competition May Be Shown In Three Ways Under Section 1 21

i. The Rule of Reason – Inference From Market Analysis and Conduct 21

ii. The Quick Look – Direct Proof of Injury to Competition 21

iii. Per Se Rule – Irrebuttable Presumption From Conduct Alone .. 22

TABLE OF CONTENTS – Continued

Page

c. The Majority of Circuits Require A Full Market Analysis to Prove Injury to Competition Under Section 2 23

d. The Ninth Circuit Permits a Rebuttable Inference of Dangerous Probability of Success Which Does Not Expand the Scope of Section 2 or Eliminate the Distinction Between Sections 1 and 2 25

i. The *Lessig* Case 25

ii. The Present *Lessig* Inference 26

iii. The *Lessig* Inference Does Not Improperly Extend The Reach Of Section 2..... 28

iv. The *Lessig* Inference Does Not Deter Pro-Competitive Conduct 29

v. The *Lessig* Inference Does Not Eliminate the Distinction Between Sections 1 and 2..... 31

vi. The Requirement of Specific Intent Limits the Reach of Section 2..... 35

vii. There Is Considerable Reasoned Support For A Flexible Standard of Proof of Dangerous Probability Outside the Ninth Circuit 36

TABLE OF CONTENTS – Continued

Page

3. Should the Court Find Error in the Instruction on Attempt To Monopolize, It Should Remand the General Verdict to the Ninth Circuit, and Dismiss the Related Petition by HK..... 45

CONCLUSION 47

TABLE OF AUTHORITIES

Page

CASES

Advanced Health-Care Serv., Inc. v. *Radford Comm. Hosp.*, 910 F.2d 139 (4th Cir. 1990) 25

Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) 22, 23, 32

Aspen Skiing Co. v. *Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985) 28

Assam Drug Co. v. *Miller Brewing Co.*, 798 F.2d 311 (8th Cir. 1986) 19

Associated Radio Serv. Co. v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir.) *reh'g denied*, 632 F.2d 894 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) ... 20, 21, 24

Atlantic Richfield Co. v. *USA Petroleum Co.*, 495 U.S. 328 (1990) 19

Aurora Enterprises, Inc. v. *National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982) 29

Bahn v. *NME Hosp., Inc.*, 929 F.2d 1404 (9th Cir.) *cert. denied*, 112 S.Ct. 617 (1991) 21, 22

Bell v. *Dow Chemical Co.*, 847 F.2d 1179 (5th Cir. 1988) 24

Blair Foods, Inc. v. *Ranchers Cotton Oil*, 610 F.2d 665 (9th Cir. 1980) 29

Blanton v. *Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007 (1985) 29, 33

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) 19

Business Electronics Corp. v. *Sharp Electronics*, 485 U.S. 717 (1988) 19, 23

TABLE OF AUTHORITIES – Continued

Page

California Steel and Tube v. *Kaiser Steel Corp.*, 650 F.2d 1001 (9th Cir. 1981) 29

Carpet Seaming Tape Licensing v. *Best Seam, Inc.*, 694 F.2d 570 (9th Cir. 1982) 29

Catlin v. *Washington Energy Co.*, 791 F.2d 1343 (9th Cir. 1986) 29, 34

Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 10, 20, 46

De Modena v. *Kaiser Foundation Health Plan, Inc.*, 743 F.2d 1388 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985) 34

Deauville Corp. v. *Federated Dept. Stores, Inc.*, 756 F.2d 1183 (5th Cir. 1985) 24

Drinkwine v. *Federated Publications, Inc.*, 780 F.2d 735 (9th Cir. 1985), *cert. denied*, 475 U.S. 1087 (1986) 34

Eastman Kodak Co. v. *Image Technical Services, Inc.*, 60 U.S.L.W. 4465 (1992) 20

FLM Collision Parts, Inc. v. *Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977) 24

FTC v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986) 15, 22, 25, 28

Forro Precision, Inc. v. *International Business Machines*, 673 F.2d 1045 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983) 29, 34

General Business Systems v. *North Amer. Philips Corp.*, 699 F.2d 965 (9th Cir. 1985) 29

TABLE OF AUTHORITIES – Continued

Page

General Leaseways, Inc. v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984) 19

Gough v. *Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979)..... 27

Hunt-Wesson Foods, Inc. v. *Ragu Foods, Inc.*, 627 F.2d 919 (1980), *cert. denied*, 450 U.S. 921 (1981) 27, 29, 30, 38

International Distribution Centers, Inc. v. *Walsh Trucking* Co., 812 F.2d 786 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987)..... 28

Janich Bros., Inc. v. *American Distillers Co.*, 570 F.2d 848 (9th Cir. 1978), *cert. denied*, 439 U.S. 829 (1977) 27, 29, 34

Jefferson Parish Hosp. Dist. No. 2 v. *Hyde*, 466 U.S. 2 (1984) 21, 23

K-Mart Corp. v. *Cartier, Inc.*, 486 U.S. 281 (1988) 7

Kelco Disposal v. *Browning-Ferris Industries of Vermont, Inc.*, 845 F.2d 404 (2d Cir. 1988)..... 23

Key Enterprises of Delaware, Inc. v. *Venice Hosp.*, 919 F.2d 1550 (11th Cir. 1990)..... 23

Lectro-Vend Corp. v. *Vendo Corp.*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982) 43

Les Shockley Racing Inc. v. *National Hot Rod Ass'n*, 884 F.2d 504 (9th Cir. 1989)..... 22

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M.A.P. Oil Co. v. *Texaco, Inc.*, 691 F.2d 1303 (9th Cir. 1982)..... 29

TABLE OF AUTHORITIES – Continued

Page

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Mesirow v. *Pepperidge Farm, Inc.*, 703 F.2d 339 (9th Cir.), *cert. denied*, 464 U.S. 820 (1983)..... 29

Mobil Oil Corp. v. *Blanton*, 471 U.S. 1007, *reh'g denied*, 471 U.S. 1120 (1985)..... 26, 31

Monument Builders of Greater Kansas City Inc. v. *American Cemetery Ass'n*, 891 F.2d 1473 (10th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990)..... 46

Movie 1 & 2 v. *United Artists Communications, Inc*, 909 F.2d 1245 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2852 (1991)..... 23

Multiflex, Inc. v. *Samuel Moore & Co.*, 709 F.2d 980 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)..... 27, 42

National Collegiate Athletic Ass'n. v. *Board of Regents*, 468 U.S. 85 (1984)..... 22, 25, 32

National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 32

Neumann v. *Reinforced Earth Company*, 786 F.2d 424 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 851 (1986) 20, 24

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TABLE OF AUTHORITIES – Continued

Page

Perington Wholesale, Inc. v. *Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979) 24

Photovest Corp. v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) 24

Quality Foods de Centro America v. *Latin Amer. Agribusiness Devel. Corp.*, 711 F.2d 989 (11th Cir. 1983) 24

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Swift & Co. v. *United States*, 196 U.S. 375 (1905) 36

Thurman Industries v. *Pay 'N Pak Stores, Inc.*, 875 F.2d 1369 (9th Cir. 1989) 27, 29

Times-Picayune Publishing Co. v. *United States*, 345 U.S. 594 (1953) 27, 35

TABLE OF AUTHORITIES – Continued

Page

United States v. *American Airlines*, 743 F.2d 1114 (5th Cir. 1984), *reh'g denied*, 756 F.2d 882 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985) 14, 23, 42

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United States v. *Yellow Cab Co.*, 332 U.S. 218 (1947) 46

Volvo N. Amer. Corp. v. *Men's Intern. Pro. Tennis Council*, 857 F.2d 55 (2d Cir. 1988) 23, 27, 46

William Inglis & Sons Baking Co. v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) 34, 43

Zoslaw v. *MCA Distributing Corp.*, 693 F.2d 870 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) 29

STATUTES

Clayton Act Section 4 (15 U.S.C. § 15) 2

Sherman Act Section 1 (15 U.S.C. § 1) ..... *passim*

Sherman Act Section 2 (15 U.S.C. § 2) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

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TABLE OF AUTHORITIES – Continued

Page

Roszkowski and Brubaker, *Attempted Monopolization: Reuniting a Doctrine Divorced From Its Criminal Law Roots and the Policy of The Sherman Act*, 73 Marquette L. Rev., 355 (1990) 36

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No. 91-10

In The

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC. and
KENNETH B. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF ON THE MERITS BY RESPONDENTS

OPINION BELOW

The Memorandum Decision of the Ninth Circuit Court of Appeals is included in the Appendix to the Petition for Writ of Certiorari at page A1.

JURISDICTION

Respondents do not disagree with Petitioners' Statement of Jurisdiction.

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. § 1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any one person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

3. Section 4 of the Clayton Act (15 U.S.C. § 15) provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor

> . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. Procedural Background.

Shirley and Larry McQuillan[1] d/b/a Sorboturf Enterprises commenced this action by filing a complaint for violations of state and federal antitrust laws, RICO violations, state law unfair competition and interference with prospective advantage. The jury found against petitioners[2] under section 2 of the Sherman Act as well as on multiple RICO and state law claims. The other defendants were also found liable on two section 1 claims. All defendants appealed. In a Memorandum Decision, the Ninth Circuit Court of Appeals affirmed each of the antitrust verdicts. In light of these affirmances, the Ninth Circuit did not specifically address the RICO or state law verdicts.

The jury found Spectrum not liable for resale price maintenance under Sherman Act section 1, but liable in a general verdict for claims of monopolization, attempted

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[1] Since Shirley McQuillan was the central actor in the events leading to this lawsuit, "McQuillan" refers to her-unless the context indicates otherwise.

[2] Petitioners include Spectrum Sports, Inc. and Kenneth B. Leighton. Except where the context indicates otherwise, "Spectrum" will refer to the petitioners collectively.

monopolization, and conspiracy to monopolize under section 2. The Ninth Circuit memorandum opinion addressed only the adequacy of the evidence of attempted monopolization.

B. Factual Background.

1. BTG Grants BTR a Non-Exclusive License for Manufacture and Distribution of Sorbothane Worldwide.

Sorbothane is a shock absorbent solid polymer that can "absorb energy like a liquid." R. 1670. It was invented by Dr. Maurice Hiles under the auspices of British Technology Group ("BTG"), an agency of the British government. R. 1666; 1670-1672.[3] BTG holds both the United States and British patents on sorbothane. R. 1672, 1675. BTG granted BTR Development Services, Ltd. a non-exclusive license to manufacture and sell sorbothane worldwide. J.A. 216.[4]

2. Kenneth M. Leighton Brings Sorbothane to United States.

In 1978, BTR, Inc., a holding company ultimately owned by BTR, plc, a UK public company ("BTR"),

[3] Some documents reflect "National Research and Development Corporation," or "N.R.D.C.," BTG's former name. R. 1671.

[4] The company is also referred to as "B.T.R. Central Development." See R. 1680.

purchased Hamilton Kent ("HK"), a United States rubber extruding company. R. 3020; 3170. Kenneth M. Leighton ("Sr") was the president of HK at that time. R. 1230. His son, Kenneth B. Leighton ("Jr"), was also an HK employee. R. 3170.

Accompanied by Jr, Sr went to England, met Dr. Hiles and became very enthusiastic about bringing sorbothane to the United States. R. 1682; 3173. In August 1980, BTR Development Services Ltd. and HK signed a "Sorbothane Agreement," whereby HK was given an unrestricted sublicense to sell sorbothane "in all world markets."[5] J.A. 222. HK also hired Dr. Hiles as a consultant. R. 1684-1686. A United Kingdom company, Birmingham and Leyland ("Leyland"), also had a license to sell sorbothane. That license did not restrict Leyland from selling sorbothane in the United States. J.A. 221-222; R. 3280-81.

3. McQuillan Becomes a Sorbothane Distributor.

After reading a magazine article about sorbothane, Shirley McQuillan became interested in developing a sorbothane horseshoe pad. R. 161-163. After meeting McQuillan, and based on her ideas, Dr. Hiles filed a patent application for a sorbothane horseshoe pad in December, 1980. R. 1696-1697. McQuillan then began

[5] In 1982, BTR President John Cahill created a separate company for Sr to manufacture and sell sorbothane. That company was first called "Sorbo, Inc." and later "Sorbothane Inc." R. 3177. For simplicity, this brief will refer to HK, Sorbothane, Inc., and Sorbo, Inc., simply as "HK."

developing a marketable horseshoe pad for HK. R. 192; 1739. Sr assured McQuillan she would have national distribution rights to the pad when it was marketable. R. 205.

HK focused on marketing other sorbothane products, including shock absorbing shoe inserts. R. 793. HK decided in early 1981 to hire regional distributors to sell sorbothane. R. 1238. In mid-1981, HK awarded McQuillan and her company, Sorboturf, the sorbothane distributorship for the southwest territory. R. 212. HK also awarded a distributorship to McQuillan's father, Myron McCone, and his company, Rocking Horse Ranch. R. 1239. Jr resigned from HK in the summer of 1981 and formed Ohio Cushions to become the midwest sorbothane distributor. Ohio Cushions later changed its name to Spectrum Sports. R. 484; 777; 794-795.

4. HK Maintains Sorbothane Prices with Price Fixing Agreements.

BTG refused to give BTR an exclusive license in the United States. J.A. 345; 350. BTR's internal documents from late 1980, however, reflect a verbal promise from BTG not to grant another United States license as long as BTG was getting a good royalty return from BTR. J.A. 344-45. While BTG later denied having made any such promise[6] (E.R. 86), HK was in fact the only manufacturer of sorbothane in the United States in 1981.

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[6] Notwithstanding this denial by BTG in late 1981, HK represented to Nike in 1982 that BTG had made such a verbal promise. J.A. 315.

BTR believed that sorbothane was unique and that there were no competitors "unless they have broken a patent." R. 2276. Thus, as the only sorbothane manufacturer in the U.S., HK could dictate high prices unhampered by any competitive threat. In January 1982, BTR President John Cahill boasted to Sr: " . . . we are in a seller's market. This means we can, at the moment,-at least write our own terms, make our own price, and establish our own marketplace." J.A. 266. He further exulted: "This tells us that like it or not they can only get this product from us. The product we are offering is something that they don't want – they *need* it – and therefore they are prepared to bend their rules to comply with our requirements." (Emphasis in original.) J.A. 266. After a price increase for insoles in mid-1982 to achieve Cahill's arbitrary 40% profit before taxes target (J.A. 308), Cahill wrote with satisfaction "the market seems to have digested this without trouble (no need for Digel yet)." J.A. 310. In commenting on this "pricing policy" Cahill urged "We have a super product here. Let's milk it NOW." J.A. 308. Cahill, however, also cautioned: " . . . our success will breed competitors. We must keep our antennas out and make sure that we are aware as soon as possible of any competitive movement in the marketplace in order that we can stifle it by threatening to take legal action because of infringement of our patent." J.A. 322.[7]

Eager to maximize its profits, provide a high return to BTG to maintain its exclusivity, and exploit its control

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[7] Of course, a mere licensee or sub-licensee cannot sue for patent infringement. *K-Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281 (1988).

of a unique product, HK entered into price fixing agreements with each regional distributor requiring each to sell to retailers at a fixed mark-up. Moreover, regional distributors had to "police" retailers to ensure a fifty percent mark-up at the retail level. R. 230; 824-825. The agreement also precluded the regional distributors from selling sorbothane to discount stores. R. 298. HK marketing manager, Laurene Heinsohn ("Heinsohn"), instructed regional distributors to stop shipping sorbothane to any retailer caught discounting. She threatened to terminate distributors who violated the pricing agreements. R. 299; 828-829; 1094.

HK, however, soon discovered it could not rely on five independent regional distributors to enforce the price fixing agreements. McQuillan, for example, agreed to police retailers but did not do so. R. 300; 827. She also sought permission from Sr (unsuccessfully) to sell sorbothane to a discount sporting goods store. R. 298. Heinsohn had to warn another distributor about allowing retailers to violate the pricing agreement. J.A. 175-177. She also was asked to investigate a West Virginia retailer who was selling below the "recommended price." J.A. 177; R. 1837. Unlike the other distributors, however, Jr was an enthusiastic price fixer who devised his own methods of policing retailers. R. 830.

5. Jr, Sr and John Burne Agree to Terminate Regional Distributors to Maintain High Prices.

HK's target retailers for sorbothane insoles were athletic stores and medical supply outlets.[8] Other than

[8] HK's markets specifically excluded the mass market (i.e. drug stores and discount stores) because the mass market was more price sensitive and would not allow the desired profit margins. J.A. 260-263.

packaging, there was no difference in 1982 between the "athletic" insole and the "medical" insole. R. 1753-1755. The regional distributors sold to both types of outlets. R. 819.

In January 1982, Sr decided to appoint a national medical distributor, IEM, a company owned and operated by John Burne ("Burne"). J.A. 346. Within weeks of his appointment, Burne arranged a meeting with Jr, Sr and Heinsohn at Jr's office to discuss pricing. J.A. 178. Burne pointed out that he could sell "medical" insoles for twice the price of "athletic" insoles. The regional distributors, however, presented a "problem of control" because they could not be counted on to act in unison with Burne to maintain and raise prices. J.A. 179-180. Burne argued he needed a single national athletic distributor so that price fixing agreements could be enforced. J.A. 180. As Heinsohn explained it: "It would be easier for him (Burne) to enter into an agreement with one person, perhaps entice that person to also raise their prices, or at least not infringe on his market." J.A. 180. The group agreed that Jr would become that "one person." J.A. 180.

Sr and Burne wanted to terminate the regional distributors outright. J.A. 181. However, when Heinsohn stated she believed HK needed good cause for any such termination, the group decided to try another approach. J.A. 181.

HK first tried to persuade the regional distributors to relinquish their distributorships by inflating Jr's performance figures to portray him as the national leader. J.A. 181-183. When that failed, HK terminated two of the

regional distributors for minor credit and payment problems.[9] R. 864-865; 871-872. McQuillan, however, had a perfect credit and payment history. R. 869.

6. HK Enters Into a "Harmonious Marketing Agreement" With Leyland.

HK's ability to dictate high prices depended upon excluding other sorbothane manufacturers from making sales into the United States. Cahill believed competition "degraded" the market. J.A. 296. As long as HK controlled the sale of sorbothane in the U.S., it could "write [its] own terms, make [its] own price, and establish [its] own marketplace." J.A. 266-267. Leyland posed a competitive threat because its license did not restrict it from selling sorbothane in the United States. J.A. 221-222. HK would pose a similar threat to Leyland if HK sold into the European market. These two companies therefore entered into what Heinsohn described as a "harmonious marketing relationship." J.A. 300.[10] Under this agreement, HK

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[9] A BTR audit conducted shortly thereafter revealed that Jr's account was far more delinquent than those of the terminated distributors. R. 866-867.

[10] BTR attempted to argue at the Ninth Circuit Court of Appeals and on its Petition for Writ of Certiorari that HK and Leyland were related corporations that could not conspire under *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). As the United States pointed out in its first amicus curiae brief, however, BTR did not present evidence of any relationship between Leyland and HK that would give rise to a *Copperweld* situation. (See Brief For the United States as Amicus Curiae pp. 13-14.)

would not sell into Europe and Leyland would not sell into the United States. R. 1845-1846.

HK and Leyland honored their agreement. For example, HK objected immediately when Leyland agreed to supply Frelen U.S. with sorbothane. HK told Leyland "the import of finished sorbo parts to a U.S. customer is in direct opposition to a harmonious marketing relationship between our two companies." J.A. 300-301. Leyland immediately apologized and requested "please advise if you feel we are guilty of any further infringements at any time." J.A. 302. Similarly, Sr told Leyland "please don't get involved with Nike" if Nike wanted to produce in the U.S. J.A. 314. HK also put pressure on potential North American sorbothane customers not to buy from Leyland. See, e.g., J.A. 313; 294. The obvious effect of the market allocation agreement between Leyland and HK was to allow HK to remain the sole U.S. supplier of sorbothane, and to maintain its supra-competitive price structure.

7. BTR Attempts to Persuade BTG to Make BTR's Sorbothane License Exclusive.

HK eliminated the competitive threat from Leyland, but greatly feared BTG would license another U.S. sorbothane manufacturer who would destroy HK's monopoly. Therefore, as early as 1981, BTR aggressively solicited an exclusive license from BTG. J.A. 291. This campaign continued into 1983 notwithstanding BTG's repeated refusals to grant exclusivity to BTR. J.A. 285 ("we are again pressing BTG hard to convert our present sorbothane licence [sic] into an exclusive licence [sic] for U.S.A."), J.A. 350. The campaign included giving BTG

forecasts for future sales of sorbothane by HK that Sr later claimed were inflated. J.A. 338-339; J.A. 201-202; R. 1479-1484. Sr also asked Dr. Hiles (a BTG consultant for years) to use his influence with BTG to help eliminate the threat of competition. R. 1846-1847.

BTR became quite concerned in early 1983 that an unidentified U.S. company had applied to BTG for a license. J.A. 324. Sr discovered the company was Goodyear and complained bitterly that it might "start a price war." He proposed a meeting to convince BTG to reject Goodyear's proposal. J.A. 328. Two months later, Sr reported to Cahill that BTG had to "go through motions" (sic) with the Goodyear request to prevent criticism from the U.K. government. J.A. 334. Sr suggested that increasing BTR's royalties to BTG "would be a better solution than inviting competition." J.A. 335.

Cahill and Sr also became concerned that Dr. Hiles was conspiring with Goodyear to assist in it's licensing efforts. J.A. 296. Cahill met with Dr. Hiles to warn him against making any "clandestine arrangement" with Goodyear "which will promote another license by BTG in the Americas. . . . " J.A. 268-269.

8. HK Terminates McQuillan's Distributorship.

As discussed above, Sr, Jr, and Burne all agreed the regional distributors would be a fatal impediment to a unified, national, and enforceable pricing scheme. HK, however, could not terminate McQuillan for credit problems because she had none. Therefore, Sr and Jr tried to wrest McQuillan's distributorship from her with other

tactics and threats. In March 1982, for example, a national television show, "That's Incredible," prominently featured sorbothane as the new "wonder product" for runners and other athletes. Jr gave the show's producer his own telephone number to prevent McQuillan from receiving any of the 14,000 telephone calls prompted by the broadcast. Jr also intercepted all the mail. R. 330-332.

In April 1982, Sr and Heinsohn both told McQuillan she could be the national equestrian sorbothane distributor (which she had already been promised as a result of her work developing a sorbothane horseshoe pad) only if she would relinquish to Jr her athletic distributorship. R. 880-881. Jr told McQuillan she could either come to an agreement with him or she would be "looking for work." R. 363.

When McQuillan would not agree to Jr's terms, Sr appointed another national equestrian distributor. R. 427. The same day as an unsuccessful and unpleasant negotiation session between McQuillan and Jr, HK suddenly imposed on McQuillan new and onerous credit limits. R. 384.[11] HK also raised the prices of sorbothane without giving McQuillan notice. R. 899. In June 1982, HK appointed a new national distributor for the "box shoe"[12] and military trades which had been part of McQuillan's market. R. 924-925. HK also forced McQuillan to surrender her customer list on a "confidential" basis. HK later gave

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[11] HK imposed on McQuillan a $5,000 limit. R. 894. During the same period, Jr had a limit of $100,000. R. 878-879.

[12] "Box shoe trade" refers to stores carrying a variety of types of shoes as opposed to a specialty shop. R. 924.

the list to Jr. J.A. 200. Finally, on August 1, 1983, HK notified McQuillan in writing it would no longer accept her orders. J.A. 257. It also terminated her father's distributorship. E.R. 79.

After her termination, McQuillan wanted to continue as a sorbothane distributor. Because of HK's "harmonious marketing relationship" with Leyland, however, there was no other source of sorbothane in the United States. Thus, McQuillan's distributorship was destroyed. R. 506.[13] Pursuant to the plan Sr, Jr, and Burne had developed in January 1982, Jr became the new national sorbothane athletic distributor. R. 504-505.

SUMMARY OF ARGUMENT

1. The Jury Instructions For Attempt to Monopolize Were Correct.

"Dangerous probability of success" is the element of an attempt to monopolize claim under Sherman Act section 2 that ensures the defendant's conduct poses a threat to competition, not merely to competitors.[14] The issue

[13] Jr's claim that McQuillan was terminated for her association with Goodyear was pretextual and obviously disbelieved by the jury. Although Sr was deposed twice and specifically asked why he terminated McQuillan's distributorship, he never claimed until trial it resulted from her Goodyear association. R. 3126-3131.

[14] *See, e.g., United States* v. *American Airlines*, 743 F.2d 1114, 1119 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985) ("the requirement that an accused's conduct have a dangerous probability of success expresses a significant antitrust principle that the antitrust laws protect competition, not competitors").

before the Court is how the dangerous probability of success element may be proved.

Petitioners and amicus curiae overstate the inference of dangerous probability of success permitted by the Ninth Circuit generally, and by the trial court in this case. The Ninth Circuit does not permit the imposition of liability without considering the actual probability of monopolization. Rather, the Ninth Circuit has diverged from the other circuits on the evidence required to prove dangerous probability of success.

Like the other circuits, the Ninth Circuit permits the jury to infer dangerous probability of success from the defendant's market power and anticompetitive conduct, and permits the defendant to disprove dangerous probability through market analysis and through evidence of procompetitive purpose and effect. Unlike the other circuits, the Ninth Circuit also permits the jury to infer dangerous probability of success from evidence of the defendant's conduct or the anticompetitive effects of that conduct. In this case, there was evidence sufficient to infer dangerous probability of success from market analysis or from anticompetitive conduct and its effects.

The Ninth Circuit approach to dangerous probability of success is consistent with analysis of injury to competition under section 1 of the Sherman Act. In *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986), the Court held that since market power is merely a surrogate for direct evidence of injury to competition, where plaintiff shows injury to competition, there is no need for the arduous process of market definition and analysis. Likewise, the Court has repeatedly affirmed that certain conduct, found

over time to injure competition, may be condemned under per se rules without proof of market power.

This reasoning should apply to proof of dangerous probability of success – the injury to competition component of the attempt to monopolize offense. The jury instructions in this case correctly permitted the jury to infer dangerous probability of success only from evidence of conduct, and its effects on price and competition, that demonstrated a dangerous probability of monopolization.

2. Should the Court Find Reversible Error In the Jury Instructions, It Should Remand the Section 2 Verdict For Consideration By the Ninth Circuit and Dismiss the Related Petition.

Spectrum was found liable on a general verdict for monopolization, attempt to monopolize, and conspiracy to monopolize. Spectrum does not assign any error in the monopolization or conspiracy to monopolize instructions. Should the Court find error in the attempt to monopolize instructions, McQuillan requests the Court remand the general verdict for consideration of the effect of that error, if any, on the general verdict, in light of the evidence of monopolization and conspiracy to monopolize. McQuillan also requests the Court dismiss petition 91-32 (the related petition filed by HK, et al) which raises a similar *Lessig* issue, since the petitioners in that case were also found liable on two section 1 claims.

ARGUMENT

1. Spectrum Was Not "Exonerated" of the Conduct Supporting the Section 2 Verdict.

Before challenging the jury instructions for attempted monopolization, Spectrum claims there was insufficient evidence to support the section 2 verdict because Spectrum was not found liable for resale price maintenance under section 1.[15] From this, Spectrum incorrectly concludes it did not participate in the resale price maintenance scheme as a matter of law, and must have been found liable under section 2 based solely on "unfair" or "unkind" conduct.

Spectrum was found liable for attempt to monopolize based on all of its anticompetitive conduct, including resale price maintenance. Spectrum was not found liable for resale price maintenance under section 1 only because the jury instruction precluded such a verdict. The instructions provided:

> Resale price fixing is illegal under Section 1 of the Sherman Act and Cartwright Acts. *It is an Agreement between firms at different levels of a chain of distribution* to set the resale prices or price ranges for production.
>
> . . .
>
> In order to win this claim, plaintiffs must prove each of the following by a preponderance of the

[15] Although there was evidence of a horizontal price fixing and market allocation agreement between Spectrum and IEM, the only section 1 claim asserted against Spectrum was for resale price maintenance.

evidence: first, *that the defendant entered into the agreement with another distributor of the defendants' or with the plaintiff, to fix resale prices* . . . . (emphasis added).

R.T. 4328-4329. These instructions properly required the jury to find a resale price maintenance agreement between firms at different levels in the chain of distribution, but then unnecessarily required the defendant's agreement to be with "another distributor of defendants' or with the plaintiff." Since Spectrum's resale price fixing agreement was with HK, the jury could not find Spectrum liable.[16]

The section 1 instruction, however, did not preclude the jury from considering Spectrum's participation in the resale price fixing scheme as anticompetitive conduct from which to infer dangerous probability of success under section 2.[17] The Court should indulge every reasonable inference from this price fixing evidence in its consideration of the section 2 verdict.

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[16] The jury could and did find against HK, since HK also reached an agreement with IEM, a non-defendant distributor at another level of distribution.

[17] Spectrum also participated in a horizontal price fixing and market allocation agreements with IEM. These agreements, under well-settled law, are always anticompetitive and never justified. Spectrum and amicus curiae ignore this evidence.

2. Permitting The Jury to Infer, Under Certain Circumstances, Dangerous Probability of Monopolization, Is Consistent With Well Established Law Under Section 1 and the Purposes of the Sherman Act.

a. Sherman Act Sections 1 and 2 Both Require A Showing of Injury To Competition, Ordinarily Based on Market Power.

The antitrust laws were enacted for the protection of competition, not competitors. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962). Therefore, antitrust analysis, particularly in the past decade, has carefully considered whether the alleged conduct could cause injury to competition.[18]

The extent to which a particular restraint alleged to violate section 1 causes injury to competition is ordinarily determined under the rule of reason. *Business Electronics Corp.*, 485 U.S. at 723. Under the rule of reason, only restraints imposed by parties shown to have "market power" are deemed to injure competition.[19]

To show injury to competition under section 2, plaintiff must show either monopolization – the virtual elimination of competition in a relevant market – or the threat

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[18] *See, Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990); *Business Electronics Corp.* v. *Sharp Electronics*, 485 U.S. 717 (1988); *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986); *United States* v. *Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990).

[19] *See, e.g., Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 219 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Assam Drug Co.* v. *Miller Brewing Co.*, 798 F.2d 311, 315-16 (8th Cir. 1986); *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588, 596 (7th Cir. 1984).

of monopolization. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984). The defendant must possess "monopoly power" to be liable for monopolization, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), or "market power," (as under section 1) to be liable for attempt to monopolize. *See, e.g., Neumann* v. *Reinforced Earth Company*, 786 F.2d 424, 428 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 851 (1986) (dangerous probability must be proved through market power); *Shoppin' Bag of Pueblo, Inc.* v. *Dillon Cos.*, 783 F.2d 159, 162 (10th Cir. 1986) (requiring "market strength that approaches monopoly power").

In economic terms, market power and monopoly power are the power to raise prices or exclude competition. *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 60 U.S.L.W. 4465 (1992), 1992 U.S. Lexis 3405, 10; *United States* v. *E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Monopoly power is simply a high degree of market power. *Eastman Kodak Co.*, 1992 U.S. Lexis 3405 at 22. Thus, the determination of injury to competition, under either section 1 or 2, generally depends on the degree of market power exercised by the defendants (section 1) or defendant (section 2). *See, e.g., Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1348-49 (5th Cir.) *reh'g denied*, 632 F.2d 894 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

b. Injury To Competition May Be Shown In Three Ways Under Section 1.

i. *The Rule of Reason – Inference From Market Analysis and Conduct*. Under a full "rule of reason" analysis, plaintiff must establish the defendant has market power through a complete market analysis. *See, e.g., Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 29 (1984) (market definition is an element in any rule of reason case); *Bahn* v. *NME Hosp., Inc.*, 929 F.2d 1404 (9th Cir.) *cert. denied*, 112 S.Ct. 617 (1991). Injury to competition may then be *inferred* from the defendants' market power (its *ability* to injure competition) plus its anticompetitive conduct. *See, e.g., Associated Radio Serv.*, 624 F.2d at 1353.

ii. *The Quick Look – Direct Proof of Injury to Competition*. Market definition and a full market analysis, however, are not always required under section 1:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as reduction of output, can obviate the need for an inquiry into market power, "which is but a surrogate for detrimental effects." 7 P. Areeda, Antitrust Law ¶ 1511, p.429 (1986).

Indiana Federation of Dentists, 476 U.S. at 460-61.[20] The defendant may rebut direct evidence of injury to competition with evidence of the procompetitive effects of its conduct. *Id.* at 460-465.

iii. *Per Se Rule – Irrebuttable Presumption From Conduct Alone*. Finally, specific types of concerted action, which, after "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it," are classified as per se unlawful without market analysis or a direct showing of injury to competition. *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 344 (1982). "[P]er se rules are appropriate only for 'conduct that is manifestly anticompetitive,' that is, conduct that would always or almost always tend to restrict competition and decrease output."

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[20] In *Indiana Federation*, dentists agreed not to provide x-rays demanded by health insurers, thereby preventing the insurers from monitoring the cost of care. This was a naked restraint on competition. The Court held that while the agreement was not conduct previously classified as per se unlawful, a rigorous market analysis was not necessary. *See also, National Collegiate Athletic Ass'n.* v. *Board of Regents*, 468 U.S. 85, 109-110 (1984); *Bahn* v. *NME Hosp., Inc.*, 929 F.2d at 1413 (9th Cir.) ("If the plaintiff can make a showing of anticompetitive effects, a formal market analysis becomes unnecessary"); *Les Shockley Racing Inc.* v. *National Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) (requiring proof of "injury to competition within a framework of market analysis" where the plaintiffs did not show "actual detrimental competitive effects such as output decreases or price increases"); *Reazin* v. *Blue Cross and Blue Shield, Inc.*, 899 F.2d 951, 966-968 (10th Cir.), *cert. denied*, 110 S.Ct. 3241 (1990), (while market share is convincing evidence of monopoly power, so is actual price control and exclusion of competitors).

Business Electronics, 485 U.S. at 723 (citations omitted). The per se rule is an irrebuttable presumption of injury to competition. *Maricopa*, 457 U.S. at 351 (refusing to consider procompetitive justifications). The per se rule has developed under section 1 in recognition of the enormous cost and delay of a full rule of reason analysis. *Maricopa*, 457 U.S. at 345; *Jefferson Parish*, 466 U.S. at 15-16, n.25.

c. The Majority of Circuits Require A Full Market Analysis to Prove Injury to Competition Under Section 2.

The issue before the Court is the evidence required, and inferences permitted, to show injury to competition sufficient to establish the dangerous probability element of a claim for attempt to monopolize. More specifically, was the evidence that Spectrum participated in resale price maintenance, horizontal price fixing, and market allocation agreements sufficient to support a rebuttable inference of dangerous probability of monopolization of the market for sorbothane athletic insoles?

The circuits agree that a showing short of monopolization is sufficient. The plaintiff need only show dangerous probability of success of achieving monopoly power – i.e., dangerous probability of control over price or output. All circuits also agree that the jury may infer dangerous probability of success from a showing of market power combined with anticompetitive conduct.[21] This

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[21] *See, e.g., Key Enterprises of Delaware, Inc.* v. *Venice Hosp.*, 919 F.2d 1550, 1565-66 (11th Cir. 1990); *Movie 1 & 2* v. *United Artists Communications, Inc.*, 909 F.2d 1245, 1255 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2852 (1991); *Volvo N. Amer. Corp.* v. *Men's Intern. Pro. Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988); *Kelco Disposal* v. *Browning-Ferris Industries of Vermont, Inc.*, 845 F.2d 404, 408-09 (2d Cir. 1988); *American Airlines*, 743 F.2d at 1119.

is the same showing required under the rule of reason (section 1) to show injury to competition.[22]

Yet unlike under section 1, the majority of circuits require, in *every* case, a complete market analysis to show injury to competition. The plaintiff must define a relevant market, compute the defendant's market share, and analyze competitive conditions relevant to whether that market share connotes the power to control prices or exclude competition.[23] Defining the relevant market and the defendant's market share are elements of plaintiff's *prima facia* case.[24]

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[22] *Deauville Corp.* v. *Federated Dept. Stores, Inc.*, 756 F.2d 1183, 1192 (5th Cir. 1985) (comparing injury to competition under rule of reason and section 2); *Associated Radio Serv.*, 624 F.2d at 1348-54 (single analysis of market power for section 1 and section 2 claims); *Reazin*, 899 F.2d at 973 (adopting discussion of section 1 market power as showing of monopoly power for monopolization verdict); W. Holmes, *Antitrust Law Handbook*, § 203[1] at 294 (1992) ("the analysis of [attempt to monopolize] is much the same reasonableness seen under Sherman Act Section 1 rule of reason").

[23] *Quality Foods de Centro America* v. *Latin Amer. Agribusiness Devel. Corp.*, 711 F.2d 989, 996 (11th Cir. 1983); *Perington Wholesale, Inc.* v. *Burger King Corp.*, 631 F.2d 1369, 1376 (10th Cir. 1979); *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 711-714 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 276 n.69 (5th Cir.), *reh'g denied*, 582 F.2d 41 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979).

[24] *See, e.g., Neumann* v. *Reinforced Earth Company*, 786 F.2d 424, 429-30 (D.C. Cir.), *cert. denied*, 479 U.S. 851 (1986); *Bell* v. *Dow Chemical Co.*, 847 F.2d 1179, 1184 (5th Cir. 1988); *FLM*

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d. The Ninth Circuit Permits a Rebuttable Inference of Dangerous Probability of Success Which Does Not Expand the Scope of Section 2 or Eliminate the Distinction Between Sections 1 and 2.

Only the Ninth Circuit permits the plaintiff – under certain circumstances – to forego full market definition and analysis to prove injury to competition sufficient to constitute an attempt to monopolize.

i. *The Lessig* Case. The divergence by the Ninth Circuit began with *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964),

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Collision Parts, Inc. v. *Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

It is unclear what effect *NCAA* and *Indiana Federation* will have on section 2 analysis in circuits requiring market power analysis to prove injury to competition. Under the reasoning of *Indiana Federation*, where there is direct proof of injury to competition, it is unnecessary to perform market analysis. Courts have at least recognized the *relevance* of direct evidence of higher prices or exclusion of competitors. *See, e.g., Advanced Health-Care Serv., Inc.* v. *Radford Comm. Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990); *Reazin*, 899 F.2d at 973; *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 305-07 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). Professor Holmes recommends that section 2 injury to competition analysis conform to the Court's analysis in *Indiana Federation of Dentists*, and not be based on "ritualistic [market power] analysis." W. Holmes, *Antitrust Handbook*, § 2.03[1], at 281 (1992). It is unclear, however, whether the majority of circuits would forego market analysis where there is such direct evidence of detrimental effects on competition.

but has evolved significantly.[25] In *Lessig*, the trial court entered summary judgment for the defendant because the plaintiff failed to prove a relevant market or the defendant's market share, and thus could not prove dangerous probability of success. The Ninth Circuit reversed. Focusing on the wording of section 2 (which requires only an attempt to monopolize "any part" of commerce), the court concluded market power is "not in issue." *Id.* at 474. The court stated that if in reaching its verdict on plaintiffs' section 1 claims, the jury concluded defendant intended to fix prices and exclude competitors from the market, and took steps to accomplish that purpose, the jury could properly conclude the defendant attempted to monopolize a part of interstate commerce in violation of section 2. *Id.* at 475.

ii. *The Present Lessig* Inference. To the extent *Lessig* holds dangerous probability of success is not an element of a claim for attempt to monopolize, it indeed violates basic antitrust principles. *See Mobil Oil Corp.* v. *Blanton*, 471 U.S. 1007 (White, J., dissenting), *reh'g denied*, 471 U.S. 1120 (1985). That portion of the *Lessig* opinion, however, has been implicitly overruled by numerous later Ninth Circuit opinions.[26]

Dangerous probability of success is, and has been for many years, an element of a claim for attempt to

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[25] For a discussion of the evolution of the *Lessig* inference, see ABA Antitrust Section, *Antitrust Law Developments*, pp. 142-144. (1984)

[26] Thus, most of Spectrum's criticisms of the *Lessig* rule, which focus on the elimination of the dangerous probability element, are inapposite. Spectrum Brief at 18-19.

monopolize.[27] The current (rebuttable) "*Lessig*" inference simply provides an alternative means (other than a full rule-of-reason-like market analysis) to show dangerous probability of success, and then only under certain circumstances.

Thus, in the Ninth Circuit, the jury may infer dangerous probability of success from (1) market power and anticompetitive conduct (as in every circuit), or (2) conduct that is predatory or clearly in restraint of competition, such as a per se violation of section 1.[28] The plaintiff may also prove dangerous probability directly by showing ongoing injury to competition, i.e., effect on price or exclusion of competitors. *Thurman Industries, Inc.*, 875 F.2d at 1373; *United States* v. *Syufy Enterprises*, 903 F.2d 659, 664-71 (9th Cir. 1990).[29]

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[27] *See, e.g., Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F.2d 919, 925 (1980), *cert. denied*, 450 U.S. 921 (1981); *Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 390-91 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); *Janich Bros., Inc.* v. *American Distillers Co.*, 570 F.2d 848, 853-54 (9th Cir. 1978), *cert. denied*, 439 U.S. 829 (1977).

[28] *See, e.g., Thurman Industries* v. *Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1378 (9th Cir. 1989).

[29] Petitioners also criticize the Ninth Circuit for permitting an inference of specific intent from anticompetitive conduct. That portion of the *Lessig* inference, however, conforms with the law of all circuits. Since clear and direct evidence of specific intent to monopolize is seldom available, specific intent may be inferred from conduct: *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 627 (1953); *Volvo N. American Corp.*, 857 F.2d at 74; *Shoppin' Bag of Pueblo, Inc.*, 783 F.2d at 163; *Multiflex, Inc.* v. *Samuel Moore & Co.*, 709 F.2d 980, 992 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *Photovest*, 606 F.2d at 714-720; *Northwestern Tel. Co.* v. *American Tel. & Tel.*, 651 F.2d 76, 85 (2nd Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

iii. *The Lessig Inference Does Not Improperly Extend The Reach Of Section 2.* Several courts and commentators have misconstrued the *Lessig* inference as extending section 2 to reach conduct not shown to threaten competition. *See, e.g., International Distribution Centers, Inc.* v. *Walsh Trucking Co.*, 812 F.2d 786, 791 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987). Permitting a rebuttable inference of injury to competition by means other than a full market analysis merely recognizes that market analysis is a surrogate for direct proof of injury to competition. *See Indiana Federation of Dentists*, 476 U.S. at 461. If the plaintiff shows either (1) actual injury to competition, or (2) conduct found over time to lead to the acquisition of market power by destroying the competitive process, the plaintiff has shown dangerous probability of success.

McQuillan showed direct injury to competition by proving Spectrum guilty of conduct that always destroys the competitive process.[30] Spectrum cooperated with Burne in limiting competition in the "medical" and "athletic" insole market. Spectrum, IEM and HK agreed to fix prices in the two insole markets. The only way this arrangement could succeed was through the elimination of regional distributors as competitors with Burne in the medical market.

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[30] The Court has approved a definition of monopolization as having the following elements: (1) the possession of monopoly power in a relevant market, and (2) "the willful acquisition, maintenance, **or use of that power** by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.* 472 U.S. 585, 596 (1985). Spectrum clearly used the defendant's monopoly control of sorbothane for anticompetitive purposes.

iv. *The Lessig Inference Does Not Deter Pro-Competitive Conduct.* The Ninth Circuit has repeatedly limited the *Lessig* inference to conduct that constitutes a per se violation of section 1 or is otherwise clearly in restraint of competition. As a result, the Ninth Circuit has invoked the inference rarely, and only where the conduct was plainly injurious to competition.[31] Where the alleged restraint is not plainly injurious to competition, the Ninth Circuit requires a complete market analysis.[32]

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[31] Inference based on per se violation of section 1: *Blanton* v. *Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007 (1985); *Aurora Enterprises, Inc.* v. *National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982); *California Steel and Tube* v. *Kaiser Steel Corp.*, 650 F.2d 1001 (9th Cir. 1981). Inference based on anticompetitive acts not in per se violation of section 1: *see, e.g., Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983) (course of conduct clearly without legitimate business purpose might support inference, as might market power).

[32] *Thurman Industries*, 875 F.2d at 1378-80; *Rutman Wine Co.* v. *E & J Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987); *Rickards* v. *Canine Eye Registration Foundation Inc.*, 783 F.2d 1329, 1335-36 (9th Cir. 1986), *cert. denied*, 479 U.S. 851 (1986); *Catlin* v. *Washington Energy Co.*, 791 F.2d 1343, 1348 (9th Cir. 1986); *General Business Systems* v. *North Amer. Philips Corp.*, 699 F.2d 965, 976 (9th Cir. 1985); *Mesirow* v. *Pepperidge Farm, Inc.*, 703 F.2d 339, 345 (9th Cir.), *cert. denied*, 464 U.S. 820 (1983); *Carpet Seaming Tape Licensing* v. *Best Seam, Inc.*, 694 F.2d 570, 580 (9th Cir. 1982); *Zoslaw* v. *MCA Distributing Corp.*, 693 F.2d 870, 888 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *Forro Precision, Inc.* v. *International Business Machines*, 673 F.2d 1045, 1059, 1061-62 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983); *M.A.P. Oil Co.* v. *Texaco, Inc.*, 691 F.2d 1303, 1308-09 (9th Cir. 1982); *Blair Foods, Inc.* v. *Ranchers Cotton Oil*, 610 F.2d 665, 668-69 (9th Cir. 1980); *Hunt-Wesson Foods, Inc.* v. *Ragu Foods*, 627 F.2d at 925-26; *Gough*, 585 F.2d at 390; *Janich Bros.*, 570 F.2d at 854 n.4.

The Ninth Circuit employs a more flexible approach only to reach conduct that poses a clear threat to competition. In *Hunt-Wesson Foods*, 627 F.2d 919, the court provides an excellent explanation of the advantages of the Ninth Circuit approach:

> To understand the reason for requiring proof of dangerous probability of success, one must keep in mind the central purpose of the attempt offense – to discourage unilateral activity that poses a threat to competition and that, if left alone, could result in the acquisition of monopoly power. P. Areeda & D. Turner, *supra*, at 312. The focus must be on the danger to competition posed by the activity and by the actor. It is apparent that each situation will present different problems that mandate a flexible approach toward the "mix" of conduct, actor, and market conditions that make up the offense. In some cases of clearly exclusionary conduct, the conduct itself, along with the exclusionary intent that can be inferred from it, poses such a danger to competition that it may be condemned regardless of the market power of the actor. In a sense, the conduct carries an inherent "dangerous probability of success." Such clearly exclusionary behavior, even though it poses no immediate measurable danger to the market, present the potential for mischief. To the extent that such conduct inevitably harms competition, there is little reason to tolerate it.
>
> On the other hand, in circumstances involving ambiguous conduct, the requisite degree of danger may not exist in the absence of appreciable market power because market power increases the potential for harm. What may be legal for the company lacking substantial market power may be illegal for the firm with such power. And where the conduct is ambiguous, the market power of the firm may help clarify the intent of the actor.

627 F.2d at 925. The Ninth Circuit has repeatedly affirmed the importance of market power analysis absent a direct showing of injury to competition or conduct that inevitably leads to monopolization.[33]

v. *The Lessig Inference Does Not Eliminate the Distinction Between Sections 1 and 2.* In criticizing the *Lessig* inference, courts and commentators point to the axiom that concerted action under section 1 is more threatening to competition than unilateral conduct.[34] Justice White, in dissenting from the denial of certiorari in *Mobil Oil Co.* v. *Blanton*, 471 U.S. 1007 (1985), articulated this criticism of the *Lessig* inference:

> Section 1 proscribes concerted action . . . in restraint of trade. Such concerted action is so inherently threatening to competition that in certain instances it is forbidden without regard to whether it has actually damaged competition in a particular market. Section 2 regulates unilateral conduct by outlawing monopolization and attempted monopolization. Because unilateral conduct is far less likely than concerted action to pose a threat to competition, "[t]he conduct of a single firm is governed by § 2 alone

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[33] See, footnote 32, *supra*.

[34] This criticism would presumably not apply to direct proof of injury to competition, as was presented in this case.

and is unlawful only when it threatens actual monopolization." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

> Because the *Lessig* doctrine allows a violation of § 2 to be found on the basis of a per se violation of § 1, without regard to the effect of a defendant's conduct in any relevant market, it appears to be in tension with these principles.

This criticism, however, creates an unnecessary distinction between the methods to achieve the common purposes of sections 1 and 2. Section 1 per se rules do not forbid certain concerted action without regard to whether that action has actually damaged competition. Rather, "[b]oth per se rules and the Rule of Reason are employed 'to form a judgment about the competitive significance of the restraint.'" *National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85, 103 (1984) (quoting *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978)). "[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same – whether or not the challenged restraint enhances competition." 468 U.S. at 104. Per se rules merely recognize that certain types of conduct have been found to always, or almost always, injure competition, and thus the interests of judicial economy and certainty are served by per se presumptions. *Maricopa*, 457 U.S. at 343-44.

The same costs and uncertainties plague market definition and market share calculations under section 2, and therefore limit the deterrent effect Congress intended. While even in the Ninth Circuit, these costs and uncertainties are generally unavoidable, the Ninth Circuit has

adopted a flexible approach that properly eliminates these obstacles to enforcement where the claim involves conduct that, with experience, the court can predict with certainty will lead to monopolization. A flexible approach also permits *direct* proof of injury to competition, which is more probative than market analysis.

Proper application of the *Lessig* inference does not weaken the distinction between sections 1 and 2. For example, the jury instructions here required the jury to find conduct, the benefits of which were "dependent upon its tendencies to discipline or eliminate competition and enable the defendant to reap the benefits of monopoly power in the future." Proper limitations on the types of conduct sufficient to support the *Lessig* inference preserve the requirement of dangerous probability of success in section 2 attempt cases.

This case certainly raises none of the concerns expressed by Justice White in *Blanton*. All of Spectrum's anticompetitive conduct was pursuant to agreement with HK and, later, Burne. This case thus presents an example of the *Lessig* inference reaching plainly anticompetitive conduct, of a type that would also have been reached by section 1 but for an unusual circumstance (i.e., the erroneous instruction that unnecessarily restricted the jury's ability to find Spectrum liable under section 1).

In any event, the *Lessig* inference is also simply that – a rebuttable inference. The defendant may always rebut the inference of dangerous probability through evidence of its lack of market power, or pro-competitive

justifications.[35] The instructions in this case permitted Spectrum to show that its conduct was not anticompetitive, or was the least drastic means to achieve a procompetitive purpose:

> An offense of an attempt to monopolize is concerned only with the unreasonable acts or practices that have the actual or reasonable or (sic)[36] foreseeable effect of substantially impairing competition in a relevant market in an unnecessarily restrictive way, or of destroying competition.
>
> The antitrust laws encourage vigorous and honest competition and the mere fact that one

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[35] *Oahu Gas Serv., Inc.* v. *Pacific Resources, Inc.*, 838 F.2d 360, 368-69 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988); *Catlin*, 791 F.2d at 1348; *Drinkwine* v. *Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir. 1985), *cert. denied*, 475 U.S. 1087 (1986); *De Modena* v. *Kaiser Foundation Health Plan, Inc.*, 743 F.2d 1388, 1395 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985); *Forro Precision, Inc.*, 673 F.2d at 1059-61; *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1029-30 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *Janich Bros.*, 570 F.2d at 853. Amicus curiae repeatedly refers to the *Lessig* inference as if it were an absolute presumption. *See, e.g.*, Amicus brief at p.23. Thus, amicus curiae describes the defendant's right to present procompetitive justifications to rebut the inference as an "inconsistency in application." Amicus curiae brief, p. 13, n. 6. Yet even the *Lessig* opinion does not create a per se rule, and virtually all post-*Lessig* decisions include consideration of evidence to rebut the inference.

[36] The words "reasonable or" appear to be an erroneous transcription of "reasonably."

> company is successful in winning sales or market shares from competitors does not mean that its conduct is exclusionary or anticompetitive.
>
> Conduct that involves the introduction of superior product, the lowering of production costs, the exercise of superior business judgment, or reasonably responding to competition should never be found to be exclusionary or restrictive, but some practices that promote competition in the short run may be illegal under the Sherman Act if they impair competition in an unnecessarily restrictive way or are used to obtain monopoly by eliminating competition.

J.A. pp. 253-254. While HK and Spectrum presented considerable evidence on market definition, market power, and pro-competitive justifications, the jury found there was no pro-competitive justification for Spectrum's price fixing and market allocation.

vi. *The Requirement of Specific Intent Limits the Reach of Section 2.* A further restriction on the scope of the attempt to monopolize offense is the unique requirement that plaintiff prove specific intent to monopolize. *Times Picayune Publishing Co.*, 345 U.S. at 626 ("[w]hile the completed offense of monopolization under section 2 demands only a general intent to do the act, . . . a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt . . . ."). Thus, a more flexible standard of proof of one element of the attempt offense hardly creates the dangers of over-enforcement predicted by critics.

vii. *There Is Considerable Reasoned Support For A Flexible Standard of Proof of Dangerous Probability Outside the Ninth Circuit*. Amicus Curiae argues that the *Lessig* inference has been "roundly criticized by commentators." Amicus Curiae brief, p. 15, n. 8. To the extent the *Lessig* opinion purports to eliminate the dangerous probability element, it has been criticized.[37] The *Lessig* inference as currently applied by the Ninth Circuit, however, has not.

Professor Sullivan recommends a flexible approach to proof of dangerous probability, pointing to the requirement of specific intent as protection against over-deterrence. L. Sullivan, *Handbook of the Law of Antitrust*, § 51, pp. 137-138 (1977).[38] He also recommends a standard of proof identical to that employed by the Ninth Circuit:

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[37] It has also been praised. See Roszkowski and Brubaker, *Attempted Monopolization: Reuniting a Doctrine Divorced From Its Criminal Law Roots and the Policy of The Sherman Act*, 73 Marquette L. Rev., 355 (1990). Roszkowski argues that Justice Holmes's reference to the dangerous probability of success in *Swift & Co.* v. *United States*, 196 U.S. 375 (1905) has been misinterpreted, and was never intended to create a separate element. Moreover, dangerous probability as a separate element conflicts with modern notions of criminal attempt, and creates a gap in antitrust enforcement against clearly anticompetitive unilateral conduct.

[38] Professor Sullivan interprets Justice Holmes's opinion in *Swift & Co.* v. *United States*, 196 U.S. 375 (1905), out of which the dangerous probability element was drawn, as simply explaining the rationale for requiring specific intent, and not as requiring near monopolization. L. Sullivan, *supra*, at 137-138. He goes on to state:

> Neither is there reason to hesitate to condemn conduct short of close probability of success on the ground that such a rule would unduly discourage

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> If the conduct is blatantly a threat to competition, there is no need to be over-nice about the degree of power the actor has already attained. On the other hand, conduct may be ambiguous unless examined in its structural setting. It may be honestly industrial, when engaged in by the firm without power, yet exclusionary where engaged in by the firm at or near monopoly levels of power.

Ibid. at 139.

Professors Areeda and Turner (to whom petitioners and amicus curiae frequently turn for support) propose an easing of the requirement of market analysis, similar to that currently practiced in the Ninth Circuit, in two situations:

> First, where it is clear that the defendant's anticompetitive actions are by themselves likely to achieve monopoly, attention to initial market shares may be dispensed with. Second, where the defendant's conduct itself both indicates the possession of power or the hope of attaining it, and is so invidious as to be without redeeming value, we may again dispense with the "significant market share" rule.

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> effective, though aggressive, competitive conduct. By requiring (under the intent test) that the conduct be of a kind plainly threatening competitive conditions, the rule already filters out any serious risk that desirable conduct will be inhibited. Conduct which constitutes an attempt is predatory, coercive, or calculated to heighten entry barriers; there is nothing which should make us hesitate to condemn it if the evidence leaves no doubt that the conduct has been properly characterized.

3 P. Areeda and D. Turner, *Antitrust Law*, ¶ 834c at 345 (1978). Areeda and Turner describe the second category as a "limited per se rule of attempted monopolization without proof of [market] power." *Ibid.*, ¶ 836a at 350. Under the limited per se rule, dangerous probability of success may be inferred without market analysis if the defendant engages in conduct:

> (1) which is totally unrelated to competition on the merits – that is, lacking any plausible claim to redeeming virtue; (2) which clearly implies the presence or prospect of some degree of durable market power – as, for example, conduct not likely to be rationally undertaken by a firm without such power or the hope of attaining it through the challenged conduct; and (3) which has potentially significant exclusionary effects in the generality of cases – in that there is a clear and direct causal connection between the conduct and the power.

Ibid., ¶ 836a, at 352.[39]

This definition closely resembles the jury instructions in this case, including:

> Specific intent may be inferred from conduct clearly threatening to competition or clearly

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[39] Professor Areeda refers to *Hunt-Wesson Foods, Inc.*, 627 F.2d at 925 as a "ray of hope" in defining the proper role of the dangerous probability element of attempt to monopolize. Areeda, *Monopolization, Mergers, and Markets: A Century Past and Future*, 75 California Law Review 959, 972-973 (1987). Professor Areeda is only critical of Ninth Circuit opinions where dangerous probability of success is inferred from ambiguous conduct. *Ibid.* To the extent courts have wrongly employed the *Lessig* inference, the proper remedy is not to eliminate the inference, but to further define it.

> exclusionary. That is conduct whose anticipated benefits are dependent upon a tendency to discipline or eliminate competition and thereby enhance a firm's long-term ability to reap the benefits of monopoly power.

J.A. 252.

> An offense of an attempt to monopolize is concerned only with the unreasonable acts or practices that have the actual or reasonable or foreseeable effect of substantially impairing competition in a relevant market in an unnecessarily restrictive way, or of destroying competition.

J.A. 253.

> Although the exclusionary or restrictive acts need not be sufficient in themselves to bring about a monopoly, Plaintiffs must prove that the acts or practices engaged in by the Defendants had a significantly exclusionary or restrictive effect of a type which, if continued, are likely to result ultimately in a monopoly.

J.A. 254.

> Furthermore, even in absence of direct evidence not (sic) [of] specific intent you may find for the Plaintiff if you conclude either that the Defendants engaged in conduct that formed the basis for substantial restraint of trade under Section 1 of the Sherman Act under the instructions you have received from (sic) [for] determining conspiracies or combinations in restraint of trade, or that the conduct was plainly harmful to the competition, or exclusionary. That is, that its benefits were dependent upon its tendencies to discipline or eliminate competition and enable

the defendant to reap the benefits of monopoly power in the future.[40]

J.A. pp. 254-55.

Professor Hovenkamp, who criticizes the *Lessig* opinion, admits the fundamental point supporting the current *Lessig* inference: "The market power requirements in attempt cases vary with the conduct alleged to be an attempt. A firm that seeks to create a monopoly by dynamiting its competitors' plants does not need market power – only a saboteur and a match." H. Hovenkamp, *Economics and Federal Antitrust Law*, § 6.5, at 169 (1985). While Professor Hovenkamp uses an extreme example, the point is that some conduct is so harmful to competition it inevitably leads to monopolization regardless of present market share.

Professor Hovenkamp also recognizes that "in all cases it is important to remember that the attempt offense is designed to reach conduct likely to create a monopoly." He therefore recommends a middle course between "a universal market power requirement" and dispensing with dangerous probability. "At the very least, plaintiff should be required to identify some market in which the defendant's activities, if allowed to run their course, would have generated a monopoly." Ibid. at 169-170. McQuillan identified a market in which injury was occurring. R. 4332.[41]

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[40] Again, there appear to be minor transcription errors in the jury instructions.

[41] Other advocates of an expansionary treatment of attempt to monopolize are Ponsoldt, *Clarifying the Attempt to Monopolize Offense as an Alternative to Protectionist Legislation: The Conditional Relevance of "Dangerous Probability of Success,"* 61 Notre Dame L. Rev. 1109 (1986); Comment, *Attempt to*

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Ironically, the United States argued (not so long ago) for the total elimination of the dangerous probability element:

> In recent years, the Government has argued strongly against limiting the attempted monopoly doctrine to circumstances where there is a showing of dangerous probability of monopolization within a relevant market. In our *amicus* brief in *Highland Dairy Inc.* v. *Kroger*, we followed the Ninth Circuit's lead [in *Lessig* v. *Tidewater Oil Co.*] and argued that the Section 2 attempt prohibition "reaches acts by one competitor that exclude another from the market, when the acts in themselves are so predatory, unfair or clearly without legitimate business purpose as to be patently unreasonable restraints." [*Highland Dairy Inc.* v. *The Kroger Co.*, Oct. Term 1968 No. 986, Memorandum for United States as Amicus Curiae, filed May 26, 1969, pp. 10-11.] This approach seems perfectly sound from the overall antitrust standpoint. Monopolization is basically a structural offense and therefore relevant market and position in it are important considerations. Attempted monopoly is basically a conduct offense; and,

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(Continued from previous page)

Monopolize: Dangerous Probability of Success as an Obstacle to Enforcing Section 2 of the Sherman Act, 5 U. Puget Sound L. Rev. 289 (1982); Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Prerequisite to a Prima Facie Case*, 73 Colum. L. Rev. 1451 (1973).

Amicus curiae also cites to Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 373 (1974). Professor Cooper indeed criticizes the *Lessig* opinion, but his "mildly expansionary" view is more expansionary than the present *Lessig* inference. Professor Cooper proposes a flexible approach to market power for attempt and actual monopolization. *Ibid* at 453.

> where we are dealing with conduct which is clearly predatory and unfair, there is no public policy reason for protecting it from judicial sanction. To eliminate the "dangerous probability" and "market" requirements from Section 2 attempt to monopolize cases would make it a much more effective tool for dealing with indefensible single firm conduct.

Baker, *Section 2 Enforcement – The View From the Trench*, 41 Antitrust L.J. 613, 620 (1972).

Other circuits have recognized, without adopting the *Lessig* presumption, that dangerous probability of success need not be defined in every case as market share approaching monopolization. For example, in *United States* v. *American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984), *reh'g denied*, 756 F.2d 882 (5th Cir.), *cert. dismissed*, 474 U.S. 1001 (1985), American unsuccessfully solicited Braniff to fix prices out of Dallas, where airlines combined held a 67 percent market share. Although American never obtained near monopoly power, the court held American had attempted to monopolize because at the time it made its offer, it believed it would be able to injure competition, and took steps that, if successful, would have led to monopoly power. *Id.* at 1119.

Similarly, in *Multiflex, Inc.* v. *Samuel Moore & Co.*, 709 F.2d 980, 992 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), Moore took plainly anticompetitive steps to exclude Multiflex from the market, but failed to stop Multiflex from replacing Moore as the largest seller in the market. The court nevertheless affirmed the attempt verdict, on the ground that:

> "[T]he Sherman Act's prohibition against attempted monopolization does not require that the attempt in fact ripen into an actual monopoly. It is the attempt which is the offense." The time to examine "dangerous probability" is when the acts occur.

Id. at 992, quoting *Lectro-Vend Corp.* v. *Vendo Corp.*, 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982). Both cases condemn certain conduct that is so likely to injure competition it can be condemned even where with hindsight, the defendant never obtained a market share close to 100%.

In *Shoppin' Bag of Pueblo, Inc.* v. *Dillon Cos.*, 783 F.2d 159, 163 (10th Cir. 1986), the plaintiff asked the court to adopt the current *Lessig* inference (as articulated in *William Inglis & Sons Baking*, 668 F.2d 1014). The Tenth Circuit held:

> [I]t is our view that the actual differences between the Ninth Circuit's position and the Tenth Circuit's position are not significant enough to conclude that one is preferable over the other for purposes of instructing the jury, because the actual result reached under either set of instructions will be similar.
>
> Often, no direct evidence of specific intent exists and inferences from conduct are necessary. Proving a dangerous probability of success by its very nature also demands proof of certain types of conduct . . . . In substance, the tests are very much alike.

783 F.2d at 163.

Certain types of conduct, although engaged in by a single firm, are sufficiently dangerous to competition, or indicative of substantial existing market power, to justify a rebuttable inference of dangerous probability. Again, these are rebuttable inferences; liability still depends on proof of specific intent to profit by injuring the competitive process. For example, horizontal price fixing is always dangerous to competition, and has no procompetitive justifications. Moreover, it indicates the conspirators believe they have market power, in that price fixing in a highly competitive market will simply send buyers to non-price fixers. Here, Spectrum, Burne and HK entered into agreements reflective of their conclusion (which the jury obviously accepted) that sorbothane was a unique product without effective competition.

Horizontal market allocation is also unlikely to occur in a highly competitive market, and has no procompetitive justification. The price differential employed in the medical and athletic markets enforced through agreements between Burne and Spectrum enabled Burne to charge higher prices than were possible under the regional distributor system.

Vertical price fixing is indicative of substantial existing market power, and has no pro-competitive justification. It should be considered sufficient (though not presumptive) evidence of dangerous probability without a full market analysis. Here, vertical price fixing was for the express purpose of exploiting the defendants' control of sorbothane, which at the time had no effective competition.

Fraudulent patent applications, sham litigation, and reckless patent infringement suits always injure competition, and have no procompetitive justification. A pattern of such conduct should be sufficient to support an inference of dangerous probability even without substantial market share.

As a final example, predatory pricing, (pricing below marginal cost for the purpose of raising prices above the competitive level after competition has diminished), makes sense only if it leads to monopolization, and should be sufficient to support an inference of dangerous probability regardless of market share.[42]

3. Should the Court Find Error in the Instruction on Attempt To Monopolize, It Should Remand the General Verdict to the Ninth Circuit, and Dismiss the Related Petition by HK.

As the United States advised the Court in recommending against plenary review, "the Spectrum petitioners were found liable for antitrust treble damages solely on the basis of section 2. The jury, however, was properly instructed on the elements of monopolization and conspiracy to monopolize, and it appears that the evidence on those theories may be sufficient to support a

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[42] Consider, for example, predatory pricing by a well-financed company with a small share of a market that lends itself to the exercise of market power (e.g., branded consumer goods). Provided there is sufficient evidence of specific intent, how is competition protected by waiting until most competitors have been eliminated before intervening?

section 2 verdict." Brief For The United States as Amicus Curiae, p. 16.[43]

Therefore, should the Court find error in the attempt to monopolize instruction, McQuillan requests the Court remand the section 2 general verdict for consideration by the Ninth Circuit as to whether the error was prejudicial.

As the Court is aware, HK filed its own petition for certiorari, which is being held pending resolution of Spectrum's petition. HK claims a similar error in the

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[43] For example, the jury was properly instructed that the elements of a section 2 claim for conspiracy to monopolize are (1) a conspiracy to monopolize an appreciable amount of interstate commerce, (2) specific intent to monopolize, (3) one or more acts in furtherance of the conspiracy. R.T. 4355-56. *See, United States* v. *Griffith*, 334 U.S. 100 (1948); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), *overruled* (on intra-enterprise conspiracy issue) by *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). The jury was also properly instructed that plaintiffs need not establish a relevant market and the defendant's market share. R.T. 4356. *Yellow Cab*, 332 U.S. at 226; *Monument Builders of Greater Kansas City Inc.* v. *American Cemetery Ass'n*, 891 F.2d 1473, 1484 (10th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990); *Volvo N. Am. Corp.* v. *Men's Int'l Professional Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988); *United States* v. *National City Lines*, 186 F.2d 562-68 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951).

In finding HK liable for resale price maintenance, the jury clearly found that HK, IEM *and* Spectrum reached an agreement to terminate the regional distributors and create national distributors for the athletic and medical markets who would charge fixed prices and police retail sales. Leighton Junior was an active participant in this conspiracy from start to finish. In fact, the section 2 verdict against Spectrum makes the most sense as a conspiracy to monopolize verdict.

attempt to monopolize instruction.[44] The attempt instruction, however, is not even potentially dispositive of the antitrust claims against HK, which was also found liable on two section 1 claims. Thus, even if the Court finds reversible error in the attempt to monopolize instruction, McQuillan requests the HK petition be denied.[45]

CONCLUSION

Petitioners erroneously contend the Ninth Circuit's treatment of attempt to monopolize is radically different from the other circuits, permits liability without proof of injury to competition and eliminates the distinction between section 1 and section 2 of the Sherman Act. The only difference in the Ninth Circuit is the proof required for one of the elements of the attempt offense. The Ninth Circuit recognizes that although unilateral conduct poses less of a threat to competition than concerted activity, certain conduct engaged in by a single firm may be condemned without the rigors of a full market analysis. Market analysis is not precluded – it may always be introduced by the defendant to prove the absence of injury to competition. The Ninth Circuit approach strikes

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[44] HK also challenges the market allocation verdict on the ground it is a sister company to Leyland, and urges that the jury should have been instructed as to antitrust injury.

[45] Of course, if the Court finds no error in the attempt instruction, the HK petition should also be denied.

an appropriate balance between deterring conduct that injures competition and protecting aggressive (but lawful) competition.

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IN THE

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC., *et al.*,
Petitioners,

vs.

SHIRLEY MCQUILLAN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT..... 1

ARGUMENT..... 3

I. The *Lessig* Rule Punishes A Business For Conduct Without Adequately Confirming That Such Conduct Actually Or Potentially Harms Competition..... 3

A. McQuillan Disregards The Different Treatment Of Unilateral Conduct And Concerted Action Inherent In The Antitrust Laws..... 4

B. The *Lessig* Rule Is Not Followed In Any Other Circuit..... 6

C. Commentators Do Not Advocate The Elimination Of The Dangerous Probability Requirement For Conduct Of The Type Alleged Against Spectrum.... 7

D. The *Lessig* Rule Is Wrong And, Therefore, Cannot Be "Properly Applied"..... 8

II. Spectrum's Conduct Did Not Harm Competition..... 10

III. Spectrum Did Not Engage In Anticompetitive Conduct..... 11

CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases

A.H. Cox Co. v. Star Mach. Co., 653 F.2d 1302 (9th Cir. 1981) 10

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 8,10

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 10

Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988) 10

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 4,11

Cunha v. Ward Foods, Inc., 804 F.2d 1418 (9th Cir. 1986) 12

FTC v. Indiana Fed. of Dentists, 476 U.S. 447 (1986) 5

International Distrib. Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987) 4

Janich Bros. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) 1

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) . . . . . *passim*

Lorain Journal Co. v. United States, 342 U.S. 143 (1951) 1

Mobil Oil Corp. v. Blanton, 471 U.S. 1007, *reh'g denied*, 471 U.S. 1170 (1985) 3

Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) 7,8

National Collegiate Athletic Ass'n. v. The Board of Regents, 468 U.S. 85 (1984) 5

Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.) (*en banc*), *cert. denied*, 439 U.S. 946 (1978) ... 10

Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., 783 F.2d 159 (10th Cir. 1986) 6

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962) 8

Swift & Co. v. United States, 196 U.S. 375 (1905) 1

United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) 7,8

United States v. Griffith, 334 U.S. 100 (1948) 1

United States v. Topco Assocs., Inc., 465 U.S. 596 (1972) 12

Walker Process Equip. Inc. v. Food Mach. and Chem. Corp., 382 U.S. 172 (1965) 1,3

Federal Statutes

Sherman Act, 15 U.S.C. §1 ..... *passim*

Sherman Act, 15 U.S.C. §2 ..... *passim*

Other Authorities

Areeda, Phillip and Donald F. Turner, *Antitrust Law* (1978) 7

Handler, Milton, *Reforming the Antitrust Laws*, 82 Colum. L. Rev. 1287 (1982) 9

Hovenkamp, Herbert, *Economics and Federal Antitrust Law* (1985) 7

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REPLY BRIEF FOR PETITIONERS

SUMMARY OF ARGUMENT

Petitioners Spectrum Sports, Inc. and Kenneth B. Leighton (collectively "Spectrum") ask the Court to

(1) confirm for all circuits in the United States that an attempt to monopolize claim requires proof of each of the following elements: (a) predatory, or anticompetitive, conduct, (b) specific intent to monopolize, and (c) a dangerous probability of success of monopolization. *Walker Process Equip., Inc. v. Food Mach. and Chem. Corp.*, 382 U.S. 172, 177 (1965); *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951); *United States v. Griffith*, 334 U.S. 100, 105-06 (1948); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); and

(2) reverse the Court of Appeals for the Ninth Circuit which affirmed an attempt to monopolize judgment by clinging to the rule first announced in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); a rule which allows dangerous probability of success to be inferred from evidence of specific intent to monopolize, which may, in turn, be inferred from evidence of anticompetitive, or predatory, conduct. *See, e.g., Janich Bros. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

The *Lessig* rule's double inference eliminates the inquiry into the dangerous probability of success element and even permits a jury to disregard its determination that a defendant lacked market power. When a plaintiff is excused from having to prove dangerous probability of success, a defendant may be improperly punished for conduct which may amount to, at most, a tort. A fundamental flaw of the *Lessig* rule is its failure to recognize the distinction between unilateral conduct and

concerted action inherent in sections 1 and 2 of the Sherman Act which, by design, encourages one competitor to outperform another. The *Lessig* rule disregards the stricter scrutiny section 2 claims must receive to protect lawful, vigorous business conduct.

McQuillan acknowledges the *Lessig* rule is unique to the Ninth Circuit, but argues the dangerous probability of success element is not necessary where anticompetitive conduct can be shown. McQuillan offers no convincing reason or sound justification for the continued vitality of the *Lessig* rule. In an effort to salvage the *Lessig* rule, McQuillan extracts phrases from commentators who, although rejecting the *Lessig* rule, support a limited market analysis in very rare attempt cases of which this case is not one. Further, McQuillan relies on language from a handful of cases to create what she claims is a "proper application" of the *Lessig* rule. There can be no "proper application" of an improper rule.

ARGUMENT

I. THE *LESSIG* RULE PUNISHES A BUSINESS FOR CONDUCT WITHOUT ADEQUATELY CONFIRMING THAT SUCH CONDUCT ACTUALLY OR POTENTIALLY HARMS COMPETITION.

McQuillan acknowledges that proof of a dangerous probability of success is an essential element of an attempt to monopolize claim. Brief on the Merits by Respondents at 24 [hereinafter Respondents' Brief]. McQuillan also acknowledges that to the extent the *Lessig* rule eliminates the dangerous probability element, "it violates basic antitrust principles". Respondents' Brief at 26 (citing *Mobil Oil Corp. v. Blanton*, 471 U.S. 1007 (White, *J.*, dissenting), *reh'g denied*, 471 U.S. 1170 (1985)).

McQuillan then acknowledges that in the Ninth Circuit alone, a jury may infer dangerous probability of success in either of two ways:

> 1) market power and anticompetitive conduct (as in every circuit); and
>
> 2) conduct that is predatory and clearly restrains competition.

Respondents' Brief at 27.

The first "inference" is, in fact, not an inference, but another way of stating direct proof of a dangerous probability of success. *See Walker Process Equip., Inc. v. Food Mach. and Chem. Corp.*, 382 U.S. 172, 177 (1965). In such a case, the jury need not infer anything. The jury will have evidence of a dangerous probability of success when it is provided information about the impact the anticompetitive conduct has on a relevant market. Direct proof of the dangerous probability element is required in every other circuit and is endorsed by commentators in almost every instance.

McQuillan's "second" (only) category of Ninth Circuit inferences is the classic *Lessig* formulation which permits a jury to infer a dangerous probability of success in monopolizing solely from conduct. The *Lessig* rule harms competition by dispensing with the dangerous probability element. There is no justification for such a rule.

A. McQuillan Disregards The Different Treatment Of Unilateral Conduct And Concerted Action Inherent In The Antitrust Laws.

McQuillan's analysis ignores the different treatment of section 1 concerted activity claims and section 2 unilateral activity claims. Unilateral activity is analyzed more cautiously, because the consequences of single firm conduct cannot be judged without a proper frame of reference—the single firm's relevant geographic and product market. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-69 (1984).

McQuillan tries to sidestep *Copperweld* by stating section 1 and section 2 have the same purpose—to protect competition and deter anticompetitive conduct. Respondents' Brief at 32. However, McQuillan fails to recognize that competition is protected by the requirement of direct proof of dangerous probability of success. In *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987), the court rejected plaintiff's request that the court adopt the *Lessig* rule and held:

> Eliminating the dangerous probability element from attempted monopolization would have the effect of extending the coverage of section 2 of the Sherman Act to similar behavior already covered by state and federal law.
>
> * * *

> Furthermore, any significant reduction in the antitrust plaintiff's burden of proving that the defendant has a dangerous probability of monopolizing the market might discourage the healthy competition that section 2 is intended to nurture. . . .

Id. at 791.

McQuillan, however, analyzes her attempt to monopolize claim as if it were a section 1 violation, and argues that the Court should approve the *Lessig* rule because it is consistent with the Court's rationale in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) and *National Collegiate Athletic Ass'n. v. The Board of Regents*, 468 U.S. 85 (1984) [hereinafter NCAA]. Respondents' Brief at 28.

McQuillan's reliance on these two cases is misplaced. In both cases, a market analysis was performed. In *Indiana Federation of Dentists* the FTC found that in two specific locales within the State of Indiana, dentists associated with the Federation "constituted heavy majorities of the practicing dentists." *Indiana Fed. of Dentists*, 476 U.S. at 460. The Court not only looked at the adverse effects on competition in that particular market, but also considered that "markets for dental services tend to be relatively localized," and, therefore, the restraint on competition was unreasonable, even in the absence of "an elaborate market analysis." *Id.* at 461. In *NCAA*, the district court defined the relevant market as telecasts of college football games. *NCAA*, 468 U.S. at 111-12. This market definition was supported by the district court's findings "that inter-collegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience." *Id.*

McQuillan claims that the Court's "quick look" analysis of a defendant's market power in *Indiana Federation of Dentists* and *NCAA* shows a willingness by the Court to accept inferential proof of an undue effect on competition as a surrogate to a full-blown market analysis, Respondent's Brief at 28. McQuillan is incorrect. In *NCAA and Indiana Federation of Dentists*, the Court engaged in a limited market analysis to determine if the traditional *per se* rule for the conduct in question (horizontal price-fixing in *NCAA* and group boycott in *Indiana Federation of Dentists*) should be applied. In effect, the Court required a market analysis for claims of a type where, previously, no market analysis was required. *NCAA* and *Indiana Federation of Dentists* demonstrate the increased and expanded importance of direct proof of the effects of conduct in a relevant market, not the Court's willingness to relax its requirement of direct proof.

B. The *Lessig* Rule Is Not Followed In Any Other Circuit.

McQuillan acknowledges the *Lessig* rule is not endorsed by any other circuit. Respondents' Brief at 24. The only case outside the Ninth Circuit upon which Plaintiff relies for support of the *Lessig* rule is *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159 (10th Cir. 1986). McQuillan refers the Court to *dicta* in *Shoppin' Bag*, but disregards the holding. In *Shoppin' Bag*, the court instructed the jury that dangerous probability of success is a distinct element to be proved for a successful attempt to monopolize case. *Id.* at 162. Evidence of market shares was introduced, and the jury found such evidence insufficient to find a dangerous probability of success. *Id.* at 161. The Court of Appeals approved the trial court's jury instruction and affirmed the judgment.

C. Commentators Do Not Advocate The Elimination Of The Dangerous Probability Requirement For Conduct Of The Type Alleged Against Spectrum.

McQuillan suggests that Areeda and Turner's formulation of a "limited per se rule of attempted monopolization" should apply to this case. However, Areeda and Turner not only reject the *Lessig* rule, but specifically state their proposed rule would only apply to a small category of cases in which legitimate competitive activity cannot occur, *e.g.*, fraudulent procurement of an invalid patent, reckless patent infringement, and predatory pricing. Phillip Areeda and Donald F. Turner, *Antitrust Law* §836(b), at 352-53 (1978). A resale price maintenance agreement is not the type of conduct to which their proposed rule would be applied. In fact, Professors Areeda and Turner state that resale price maintenance can never support an attempt to monopolize claim because "[r]esale price maintenance is simply not sufficiently close to that actual or threatened expansion of market power which is the key concern of monopolization or attempt prohibitions." *Id.* §828(d), at 326-327.

Professor Hovenkamp also confines his "limited per se rule" to the types of conduct condemned by Areeda and Turner. Herbert Hovenkamp, *Economics and Federal Antitrust Law* §6.5, at 169 (1985). Hovenkamp recognizes that "[o]ften the simplest way to assess the danger a defendant's conduct poses is to examine the market in which the alleged attempt occurred."[1] *Id.* §6.4, at 166.

[1] McQuillan relies upon *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), and *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983).

(Footnote continued on following page.)

D. The *Lessig* Rule Is Wrong And, Therefore, Cannot Be "Properly Applied."

McQuillan now stresses that a "proper application" of the current *Lessig* rule sufficiently conforms with the law of all other circuits. Respondents' Brief at 33. Stated differently, McQuillan asks the Court to limit the harm from a Ninth Circuit rule rejected by this Court and every other circuit. The correct approach is to dispense with *Lessig* and use the rule adopted by this Court and every other circuit.[2] In point of fact, Spectrum requested the very jury instruction that McQuillan now argues

(Footnote continued from preceding page.)

cert. denied, 465 U.S. 1100 (1984) for the proposition that certain types of single-firm conduct by firms without market power approaching a monopoly are sufficiently dangerous to form the basis of an attempt to monopolize. However, in *American Airlines*, the court found a dangerous probability that American would monopolize the relevant market because American's conduct was seen as "uniquely unequivocal and its potential, *given the alleged market conditions*, as being uniquely consequential" if Braniff had consented to the agreement. *American Airlines, Inc.*, 743 F.2d at 1119 (emphasis added).

Similarly, in *Multiflex*, the court required, and the jury found, a dangerous probability of Moore successfully monopolizing the market at the time the anticompetitive acts occurred because Moore controlled eighty percent of the relevant market. *Multiflex, Inc.*, 709 F.2d at 984.

[2] If the Court rejects the *Lessig* rule, McQuillan asks the Court to remand the section 2 verdict to the Court of Appeals for a determination as to whether or not the erroneous attempt to monopolize instruction was prejudicial. Respondents' Brief at 45-47. But this Court has held that, if one of the alternative grounds for a general verdict is legally insufficient, the verdict may not be affirmed. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods., Co.*, 370 U.S. 19, 29-30 (1962). Moreover, as suggested by the Solicitor General (Brief for the United States as *Amicus Curiae* on Petition For Writ of Certiorari) the verdict should be reversed because the trial court never instructed the jury on the need to prove antitrust injury—injury to competition in accordance with *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

turns an "improper" *Lessig* rule into a "proper application" of *Lessig*. At trial (R. 3915) and on appeal (McQuillan's Answering and Reply Brief at 30), McQuillan argued against such an instruction. The trial court agreed not to give it (R. 3915), and the Court of Appeals affirmed. Pet. App. A1-A28.

By denouncing the *Lessig* rule and its "modifications," the Court can cure the different opinions emanating from within the Ninth Circuit and bring the Ninth Circuit into line with the other circuits. Such a decision would promote the judicial interests of maintaining certainty in business transactions and the preservation of judicial resources with which Respondents claim to be concerned. Respondents' Brief at 32. Professor Milton Handler found:

> [In the Ninth Circuit], the relegation of the dangerous probability requirement to second-class citizenship has encouraged a veritable avalanche of litigation, almost none of which has turned out to be meritorious, even without the plaintiffs having to prove dangerous probability. Since *Lessig* was decided, the Ninth Circuit has entertained over one-third of all appeals reported on attempted monopolization in all the circuit courts in the United States.

Milton Handler, *Reforming the Antitrust Laws*, 82 Colum. L. Rev. 1287, 1356 (1982).

II. SPECTRUM'S CONDUCT DID NOT HARM COMPETITION.

The antitrust laws were enacted for the protection of competition, not competitors. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Therefore, injury to competition must be shown before antitrust remedies become available. *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

While McQuillan initially pays lip service to these underlying concepts, she jettisons them in her analysis of this case. McQuillan was an exclusive distributor of Sorbothane within a specified geographical area. Pl. Ex. 4, R. 214-15. McQuillan's distributorship was terminated by the manufacturer, and her territory given to another exclusive distributor, Spectrum. A substitution of distributors does not harm competition. *E.g., A.H. Cox Co. v. Star Mach. Co.*, 653 F.2d 1302 (9th Cir. 1981); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.), (*en banc*), *cert. denied*, 439 U.S. 946 (1978). McQuillan offered no contradictory evidence proving harm to competition.

III. SPECTRUM DID NOT ENGAGE IN ANTICOMPETITIVE CONDUCT.

The foundation upon which the *Lessig* double inference is constructed—proof of anticompetitive conduct—is wholly insufficient in this case. McQuillan now claims Spectrum participated in horizontal price fixing and horizontal market allocation agreements with IEM Orthopedics Inc. ("IEM") (Hamilton-Kent's medical distributor), and a resale price maintenance agreement with Hamilton-Kent Manufacturing Co. ("H-K"). Respondents' Brief at 18, n. 17. The record below contains no allegation that Spectrum engaged in any illegal horizontal activities, and the jury exonerated Spectrum on McQuillan's claim of resale price fixing.

McQuillan's Second Amended Complaint does not allege, and McQuillan introduced no evidence at trial, that Spectrum participated in any illegal horizontal activity. In fact, the jury found Spectrum did not violate the California statute prohibiting concerted activity in restraint of trade. J.A. 411.

McQuillan's argument is solely one of convenience. Before the Court of Appeals and in her response to motions for *JNOV* and new trial, McQuillan claimed IEM's medical market and Spectrum's athletic market were "different submarkets" and their products were "not functional substitutes."[3] McQuillan Answering and Reply Brief at 37; McQuillan Brief in Opposition to Motion for *JNOV* and New Trial, at 31-32. Parties operating in different markets are not competitiors and,

[3] McQuillan apparently advances this "conspiracy" argument for the first time in an attempt to address the Solicitor General's concern that there was not a multiplicity of actors in McQuillan's section 1 claims as required by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Brief for the United States as *Amicus Curiae* (on Petition for Writ to Certiorari) at 13-15.

therefore, cannot be found liable for participation in illegal horizontal activity. See *United States v. Topco Assocs., Inc.*, 465 U.S. 596, 607-08 (1972).

McQuillan also argues Spectrum engaged in a resale price maintenance agreement with H-K, but ignores the jury verdict to the contrary. McQuillan blames the contrary jury verdict upon an erroneous jury instruction which she herself proposed. When read in its entirety (R. 4328-332), the instruction allows a jury to return a resale price fixing verdict against Spectrum were the evidence sufficient, and hence there is no error. *See Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1431 (9th Cir. 1986).

CONCLUSION

For all the foregoing reasons, and the reasons contained in their Brief on the Merits, Petitioners Spectrum Sports, Inc. and Kenneth B. Leighton respectfully request this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

SPECTRUM SPORTS, INC., ET AL., PETITIONERS

v.

SHIRLEY MCQUILLAN AND LARRY MCQUILLAN
dba SORBOTURF ENTERPRISES

SORBOTHANE, INC., ET AL., PETITIONERS

v.

SHIRLEY MCQUILLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether wholly owned subsidiaries of a common corporate parent may conspire with each other for purposes of the Sherman Act.

2. Whether the jury was correctly instructed that it could find liability for attempted monopolization under Section 2 of the Sherman Act on the basis of predatory conduct by the defendant, without proof of a relevant market or the defendant's market power.

3. Whether a private antitrust plaintiff establishes antitrust injury merely by showing actual injury resulting from a per se violation of Section 1 of the Sherman Act or attempted monopolization in violation of Section 2 of the Sherman Act.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Advanced Health-Care Serv., Inc. v. *Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990)	13
American Key Corp. v. *Cole Nat'l Corp.*, 762 F.2d 1569 (11th Cir. 1985)	9
Atlantic Richfield Co. v. *USA Petroleum Co.*, 495 U.S. 328 (1990)	6, 11, 12, 17
Bright v. *Moss Ambulance Service*, 824 F.2d 819 (10th Cir. 1987)	9
CVD v. *Raytheon Corp.*, 769 F.2d 842 (1st Cir. 1985), cert. denied, 475 U.S. 1016 (1986)	9
City of Mt. Pleasant v. *Associated Elec. Co-op.*, 838 F.2d 268 (8th Cir. 1988)	13
Cohen v. *Primerica Corp.*, 709 F. Supp. 63 (E.D.N.Y. 1989)	13
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984)	4, 6, 7, 8, 9, 11
Datagate, Inc. v. *Hewlett-Packard Co.*, 941 F.2d 864 (9th Cir. 1991)	16
Directory Sales Management Corp. v. *Ohio Bell Tel. Co.*, 833 F.2d 606 (6th Cir. 1987)	13
FMC Corp. v. *Manitowoc Co.*, 654 F. Supp. 915 (N.D. Ill.), aff'd, 835 F.2d 1411 (Fed. Cir. 1987)	9
General Indus. Corp. v. *Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1987)	9
Greenwood Util. Comm'n v. *Mississippi Power Co.*, 751 F.2d 1484 (5th Cir. 1985)	13
Griffin v. *United States*, 112 S. Ct. 466 (1991)	11
Harold Friedman, Inc. v. *Kroger Co.*, 581 F.2d 1068 (3d Cir. 1978)	9

Cases—Continued: Page

International Distrib. Centers v. *Walsh Trucking Co.*, 812 F.2d 786 (2d Cir.), cert. denied, 482 U.S. 915 (1987) 9
Janich Bros. v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978) 10
Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) 4, 7
Lake Communications v. *ICC Corp.*, 738 F.2d 1473 (9th Cir. 1984) 13
Las Vegas Sun, Inc. v. *Summa Corp.*, 610 F.2d 614 (9th Cir. 1979), cert. denied, 447 U.S. 906 (1980) 4, 7
Lektro-Vend Corp. v. *Vendo Co.*, 660 F.2d 255 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982) 9
Lessig v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964) 5, 6, 10
Monsanto Co. v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984) 11
Multiflex v. *Samuel Moore & Co.*, 709 F.2d 980 (5th Cir. 1983), cert. denied, 465 U.S. 1100 (1984) 9
Neumann v. *Reinforced Earth Co.*, 786 F.2d 424 (D.C. Cir.), cert. denied, 479 U.S. 851 (1986) 9
Oahu Gas Service, Inc. v. *Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), cert. denied, 488 U.S. 870 (1988) 15
Odishelidze v. *Aetna Life & Cas. Co.*, 853 F.2d 21 (1st Cir. 1988) 13
Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) 11
Thurman Indus. v. *Pay 'N Pak Stores*, 875 F.2d 1369 (9th Cir. 1989) 15
United States v. *Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981) 9
Walker Process Equipment, Inc. v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) 9
White Bag v. *International Paper*, 579 F.2d 1384 (4th Cir. 1974) 9

Cases—Continued: Page

Wilcox v. *First Interstate Bank of Oregon, N.A.*, 815 F.2d 522 (9th Cir. 1987) 13

Statutes and rule:

Clayton Act, 15 U.S.C. 12 *et seq.*:
§ 3, 15 U.S.C. 14 2-3
§ 4, 15 U.S.C. 15 ..... 3, 4, 12
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*:
18 U.S.C. 1962(a) 3
18 U.S.C. 1962(b) 3
18 U.S.C. 1962(c) 3
18 U.S.C. 1962(d) 3
18 U.S.C. 1964(c) 3
Sherman Act, 15 U.S.C. 1 *et seq.*:
§ 1, 15 U.S.C. 1 ..... *passim*
§ 2, 15 U.S.C. 2 ..... 2, 3, 4, 5, 9, 10, 11, 12, 15, 16
Cal. Cartwright Act, Cal. Bus. & Prof. Code (West 1987 & Supp. 1992):
§ 16750 3
§ 16750(a) 3
Cal. Bus. & Prof. Code (West 1987):
§ 17200 3
9th Cir. R. 36-3 12-13

Miscellaneous:

7 P. Areeda, *Antitrust Law* (1986) 8

In the Supreme Court of the United States

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No. 91-10

SPECTRUM SPORTS, INC., ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States in this case.

STATEMENT

1. Sorbothane is a patented elastic polymer useful for its shock-absorbing characteristics. Respondents Shirley and Larry McQuillan, doing business as Sorboturf Enterprises, were regional distributors of products made

from sorbothane from 1981 to mid-1983. Pet. App. A3-A7.[1] In addition, Shirley McQuillan was involved in efforts to develop equestrian products made from sorbothane. Petitioner BTR, Inc., controlled the patent rights to sorbothane. BTR initially licensed petitioner Hamilton-Kent Manufacturing Company (Hamilton-Kent) to manufacture sorbothane in the United States. In 1982, petitioner Sorbothane, Inc., assumed Hamilton-Kent's sorbothane business. Pet. App. A3. At all relevant times, BTR owned, directly or indirectly, both Hamilton-Kent and Sorbothane. *Ibid.* Petitioner Kenneth M. Leighton, Sr., served as president of Hamilton-Kent until the creation of Sorbothane, at which time he became president of that company.[2] *Ibid.* Petitioner Kenneth B. Leighton, Jr., Leighton Sr.'s son, is a co-owner of petitioner Spectrum Sports, Inc. (Spectrum). At all relevant times, Spectrum was a distributor of sorbothane products.[3] *Ibid.*

In 1983, Sorbothane, Inc., notified respondents that it would no longer sell them sorbothane or sorbothane products. Shortly thereafter, Spectrum Sports became the national distributor of sorbothane athletic products. Respondents attempted unsuccessfully to obtain sorbothane from a British firm, Leyland and Birmingham (Leyland), which held a license to manufacture and sell sorbothane without territorial restriction. Pet. App. A4.

2. Respondents sued petitioners seeking damages for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and Section 3 of the Clayton Act, 15

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[1] Unless otherwise noted, references are to the appendix to the petition for a writ of certiorari in No. 91-10.

[2] Sorbothane, Hamilton-Kent, BTR, Inc., and Kenneth M. Leighton, Sr., are the petitioners in No. 91-32. In this brief, they are collectively referred to as the "Sorbothane petitioners."

[3] Kenneth B. Leighton, Jr., and Spectrum Sports, Inc., are the petitioners in No. 91-10. In this brief, they are referred to as the "Spectrum petitioners."

U.S.C. 14.[4] At the conclusion of the trial, the jury found by special verdict that the Sorbothane petitioners had engaged in resale price fixing and horizontal territorial market allocation of sorbothane products in violation of Section 1 of the Sherman Act, and had monopolized, attempted to monopolize, or conspired to monopolize the market for sorbothane products, in violation of Section 2 of the Sherman Act.[5] The jury found that the Spectrum petitioners were not liable for any Section 1 violation, but did find them liable under Section 2.[6] The jury awarded respondents $1,743,000 in compensatory damages on all claims, and awarded an additional $500,000 in punitive damages, which respondents later waived. The district court trebled the compensatory damages upon entry of judgment under Section 4 of the Clayton Act, 15 U.S.C. 15, RICO, 18 U.S.C. 1964(c), and the California Cartwright Act, Cal. Bus. & Prof. Code § 16750(a) (West 1987 & Supp. 1992), and awarded an additional $912,032.50 in attorneys' fees pursuant to Section 4 of the Clayton

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[4] Respondents also alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a), (b), (c) and (d), as well as fraud, breach of contract, interference with prospective business advantage, bad faith denial of the existence of an oral contract, conversion, and violations of California's unfair competition law, Cal. Bus. & Prof. Code § 17200 (West 1987), and the California Cartwright Act, Cal. Bus. & Prof. Code § 16750 (West 1987 & Supp. 1992). See R.E. 1-47 (Second Amended Complaint).

[5] The jury also found that the Sorbothane petitioners were liable for all the alleged RICO and state law violations. The jury further found that Sorbothane or Hamilton-Kent was the agent or alter ego of BTR. Special Verdict Form I-X, XIV-XVIII.

[6] The jury found that the Spectrum petitioners were liable for interference with prospective business advantage and for violations of California's unfair competition law and of Sections 1962(b), (c) and (d) of RICO, but were not liable for fraud or for violations of the Cartwright Act or Section 1962(a) of RICO. Special Verdict Form II, VIII-IX, XIV-XVIII.

Act. All petitioners filed motions for judgment notwithstanding the verdict or for a new trial, which were denied by the district court. Pet. App. A2, A30-A31; 91-32 Pet. App. 35-36; Special Verdict Form I-XIX.

3. The Sorbothane and Spectrum petitioners appealed, and the Ninth Circuit affirmed in an unpublished memorandum decision. Pet. App. A1-A28. The court of appeals found a sufficient basis for the Sherman Act Section 1 market allocation claim against the Sorbothane petitioners, Pet. App. A8-A12, and for the Section 2 verdict as to the Spectrum petitioners. Pet. App. A15-A22. Because the jury found the same damages on all the claims against petitioners, the court noted that affirming a single trebled claim against each petitioner was sufficient to support the verdict. The court of appeals thus declined to address petitioners' assertions regarding the other substantive violations found by the jury. Pet. App. A27-A28.

a. The Sorbothane petitioners contended that, under this Court's decision in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), Sorbothane and Leyland could not have conspired to allocate the market for sorbothane for purposes of Section 1 of the Sherman Act because both corporations are wholly owned direct or indirect subsidiaries of a single corporate parent. The court rejected that contention, concluding that Sorbothane and Leyland, while "existing under a family of companies controlled by BTR, PLC," nonetheless operated "autonomously." Pet. App. A10. Citing *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951), and the Ninth Circuit's own pre-*Copperweld* decision in *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), cert. denied, 447 U.S. 906 (1980), the court held that common ownership and control does not prevent members of a corporate family from conspiring in violation of the antitrust laws where those corporate family members operate autonomously. Pet. App. A11.

b. The court of appeals noted that the jury had not specified whether it found the defendants liable under Section 2 of the Sherman Act for monopolizing, attempting to monopolize, or conspiring to monopolize. Pet. App. A15. The court asserted that the verdict must stand if the evidence was sufficient to support any of the three theories (*ibid.*), and proceeded to consider only whether petitioners could properly have been found liable for attempting to monopolize. The court rejected the Spectrum petitioners' argument that the Section 2 claim must fail because there was no evidence that they intended to injure competition and no evidence of market power that could lead to the conclusion that any of the petitioners were likely to succeed in monopolizing a relevant market. Relying on its decision in *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964), the court held that "if evidence of unfair or predatory conduct is presented, it may satisfy both the specific intent and dangerous probability elements of the offense, without any proof of relevant market or the defendant's marketpower." Pet. App. A19. The court concluded (Pet. App. A21):

> There is sufficient evidence from which the jury could conclude that [the Sorbothane petitioners] and [the Spectrum petitioners] engaged in unfair or predatory conduct and thus inferred that they had the specific intent and the dangerous probability of success and, therefore, McQuillan did not have to prove relevant market or the defendant's marketing power.

c. Finally, the court rejected petitioners' contention that the district court erred in failing to instruct the jury that respondents were required to show antitrust injury and in failing to grant JNOV in the absence of any such showing. The court stated that horizontal market allocations and attempts to monopolize are treated as per se

violations of the Sherman Act, and that per se violations are presumed to cause injury to competition. Pet. App. A22. The court then held that "[t]he jury was properly instructed on the antitrust violations and there was sufficient evidence in the record to show that [respondents were] injured as a result of the defendants' conduct." *Ibid.* The court of appeals did not refer to this Court's decision in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990), which was decided after briefing and oral argument but prior to the court of appeals' decision in this case.

Although the court of appeals denied petitioners' request for rehearing and suggestion for rehearing en banc, the panel amended its opinion to delete a statement that petitioners had failed to object to the instruction incorporating the *Lessig* holding. Pet. App. A32-A33.

DISCUSSION

1. The court of appeals' opinion contains three manifest errors in legal analysis. First, the court's analysis of the intra-enterprise conspiracy issue is inconsistent with the rationale of *Copperweld Corp.* v. *Independence Tube Corp.*, *supra*. Second, the court's application of *Lessig* v. *Tidewater Oil Co.*, *supra*, perpetuates an unsound Ninth Circuit doctrine that has been rejected by every other court of appeals. Third, the court's handling of the antitrust injury issue ignores this Court's decision in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, *supra*. Remarkably, the court of appeals chose not to publish its decision in this multi-million dollar case, even though it broke new legal ground on the *Copperweld* issue and ignored controlling Supreme Court precedent on the antitrust injury issue.

a. *First.* The court of appeals concluded that wholly owned subsidiaries of a common corporate parent can conspire for purposes of Section 1 of the Sherman Act if

the subsidiaries operate autonomously. The Sorbothane petitioners correctly argue that the court's conclusion conflicts with the rationale of *Copperweld*. The Court reasoned in *Copperweld* that the Sherman Act's prohibition of concerted activity in restraint of trade encompasses only arrangements in which "two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." 467 U.S. at 769. Coordination between a corporation and its wholly owned subsidiary does not fall within that prohibition because "[t]heir objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." *Id.* at 771.

In concluding that wholly owned subsidiaries of a common parent can conspire with each other for purposes of Section 1, the court of appeals relied (Pet. App. A11) on dicta from *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons* suggesting that the intra-enterprise conspiracy doctrine applies where defendants "hold themselves out as competitors." 340 U.S. at 215. This Court expressly repudiated that language in *Copperweld*. 467 U.S. at 763-764. In addition, *Copperweld* rejected, as applied to a parent and a wholly owned subsidiary, the "so-called 'single entity' test" adopted in cases such as *Las Vegas Sun, Inc.* v. *Summa Corp.*, *supra*, the other decision on which the court of appeals relied in this case. See 467 U.S. at 772 n.18. The Court observed in *Copperweld* that criteria measuring the "separateness" of a wholly owned subsidiary "simply describe the manner in which the parent chooses to structure a subunit of itself. They cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit." *Ibid.*

There is no reason to apply a different analysis to coordination between two wholly owned subsidiaries of the

same corporate parent. See 7 P. Areeda, *Antitrust Law* ¶ 1464f, at 245-246 (1986). If each subsidiary shares the ultimate interests of the same corporate parent, the ultimate interests of the subsidiaries must also be identical, and they are thus part of a single economic unit. As a result, they are squarely embraced within this Court's reasoning in *Copperweld* that efficiencies or other advantages achieved through utilization of organizational options within a single wholly owned enterprise are a legitimate means of competition, rather than an element of a Sherman Act violation. 467 U.S. at 772-774. And "[a]ny anticompetitive activities of [the enterprise] * * * may be policed adequately" under "§ 2 of the Sherman Act and § 5 of the Federal Trade Commission Act." 467 U.S. at 777. Consequently, the court of appeals erred in approving an instruction that allowed the jury to find a conspiracy among affiliated corporations unless defendants establish that they function as a single economic enterprise. See Pet. App. A11; 91-32 Pet. 11-12 n.11.[7]

b. *Second.* Both sets of petitioners challenge the court of appeals' reliance on the *Lessig* rule to uphold a jury instruction allowing a finding of attempted monopolization without consideration of a relevant market or proof of a likelihood that actual monopolization will result. We agree with petitioners that the district court's *Lessig* instruction was erroneous.[8]

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[7] This case does not present the question of corporate affiliations involving less than one hundred percent ownership. The court of appeals relied on evidence that the affiliated corporations operated autonomously (Pet. App. A11) and did not discuss the degree of affiliation. The jury instructions allowed the jury to find an intra-enterprise conspiracy even if wholly owned corporations were involved and, to the extent that the record contains evidence on the corporate relationships, it indicates that the ownership interests at issue involved complete ownership. See Tr. 962, 1676-1684.

[8] The district court instructed the jury that "if the plaintiff has shown that the defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of relevant market or the defendant's marketing power." Pet. App. A20.

This Court has recognized that "[t]o establish * * * attempt to monopolize * * * it [is] necessary to appraise the exclusionary power * * * in terms of the relevant market." *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). See also *Copperweld*, 467 U.S. at 767 ("The conduct of a single firm * * * is unlawful only when it threatens actual monopolization."). Every court of appeals except the Ninth Circuit holds that proving an attempt to monopolize requires proving a dangerous probability of monopolization of a relevant market.[9]

The decisions of the other courts of appeals are correct. The danger that conduct will create monopoly power can be evaluated only in the context of a relevant market. Market definition in Section 2 cases is the process of identifying a product or group of products and a geographic area in which a hypothetical monopolist could charge a price significantly higher than the price that would prevail in a competitive market. If a seller has a

[9] See, *e.g.*, *CVD* v. *Raytheon Corp.*, 769 F.2d 842, 851 (1st Cir. 1985), cert. denied, 475 U.S. 1016 (1986); *International Distrib. Centers* v. *Walsh Trucking Co.*, 812 F.2d 786, 790-791 (2d Cir.), cert. denied, 482 U.S. 915 (1987); *Harold Friedman, Inc.* v. *Kroger Co.*, 581 F.2d 1068, 1079 (3d Cir. 1978); *White Bag* v. *International Paper*, 579 F.2d 1384, 1387 (4th Cir. 1974); *Multiflex* v. *Samuel Moore & Co.*, 709 F.2d 980, 991 (5th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); *United States* v. *Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982); *General Indus. Corp.* v. *Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987); *Bright* v. *Moss Ambulance Serv.*, 824 F.2d 819, 824 (10th Cir. 1987); *American Key Corp.* v. *Cole Nat'l Corp.*, 762 F.2d 1569, 1579-1581 (11th Cir. 1985); *Neumann* v. *Reinforced Earth Co.*, 786 F.2d 424, 428-429 (D.C. Cir.), cert. denied, 479 U.S. 851 (1986); *FMC Corp.* v. *Manitowoc Co.*, 654 F. Supp. 915, 936 (N.D. Ill.), aff'd, 835 F.2d 1411 (Fed. Cir. 1987).

monopoly over a product or geographic area that is too narrowly drawn to constitute a market, any attempt by the seller to charge a monopoly price will prove unprofitable because too many consumers will shift to substitute products or sellers. Thus, a seller who attempts to monopolize something narrower than a relevant market cannot cause significant economic harm.

Before this Court decided *Walker Process* and *Copperweld*, however, the Ninth Circuit "reject[ed] the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize." *Lessig*, 327 F.2d at 474. In its view, "[w]hen the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.'" *Ibid.* It added that "the specific intent [to monopolize] itself is the only evidence of dangerous probability the statute requires—perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." *Ibid.* Following this reasoning, the Ninth Circuit in a number of cases has allowed a double inference in attempt to monopolize cases: a finder of fact may use evidence of predatory conduct to infer specific intent to monopolize, and then may infer a dangerous probability of success from the evidence of intent. See, *e.g.*, *Janich Bros.* v. *American Distilling Co.*, 570 F.2d 848, 854 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978).

The effect of the double inference sanctioned by *Lessig* is to eliminate the element of dangerous probability of actual monopolization from an attempted monopolization case. That result blurs the fundamental distinction between unilateral conduct and concerted action incorporated in Sections 1 and 2 of the Sherman Act. Concerted action that constitutes an unreasonable restraint of trade is condemned under Section 1 without further inquiry into the likelihood of actual monopolization. But the law mandates a more cautious approach to single firm con-

duct. See *Copperweld*, 467 U.S. at 767; see also *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). Unilateral conduct that does not threaten actual monopolization is not subject to the Sherman Act "[i]n part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects." *Copperweld*, 467 U.S. at 767-768. The Ninth Circuit's *Lessig* rule, by allowing an inference of dangerous probability based solely on conduct, undercuts that distinction and permits the imposition of liability for unilateral conduct that has no ultimate anticompetitive effect.[10]

c. *Third.* Both sets of petitioners challenge the court of appeals' failure to address the question of antitrust injury in light of this Court's decision in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990). In *Atlantic Richfield*, the Court rejected the Ninth Circuit's conclusion in that case that antitrust injury could be presumed from a finding of a per se violation of the Sherman Act.

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[10] The district court gave the jury a *Lessig* instruction on attempted monopolization, and the jury did not specify whether its finding of liability under Section 2 of the Sherman Act was based on monopolization, attempted monopolization, or conspiracy to monopolize. Thus, it is possible that the verdict as to Section 2 rested on a finding of attempted monopolization, rather than monopolization or conspiracy to monopolize. The Ninth Circuit discussed only attempted monopolization, asserting that the Section 2 verdict must stand if any one of the three theories could support liability. But this Court has held that, if one of the alternative grounds for a general verdict is legally insufficient, the verdict may not be affirmed. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962). *Cf. Griffin* v. *United States*, 112 S. Ct. 466 (1991) (upholding general verdict where one of the possible bases of conviction was supported by inadequate evidence, and distinguishing factual insufficiency from legal inadequacy). Accordingly, the validity of the *Lessig* instruction is presented by these petitions.

> The *per se* rule is a presumption of unreasonableness based on "business certainty and litigation efficiency." * * *
>
> The purpose of the antitrust injury requirement is different. It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief.

495 U.S. at 342. Accordingly, a plaintiff seeking relief under Section 4 of the Clayton Act for alleged violations of the Sherman Act, whether or not those violations would be viewed as per se violations, must show antitrust injury.

The court of appeals did not refer to *Atlantic Richfield*, which was decided after briefing and oral argument of this case in the court of appeals but before the court issued its opinion. Instead, the court's decision blurs the distinction between whether the defendants' alleged conduct causes *injury to competition* and whether the harm claimed by the plaintiffs constitutes *antitrust injury*. The court simply held that, because all petitioners had been found to have committed per se violations of Section 1 and Section 2, "[i]njury to competition is presumed to follow from the conduct proscribed by these Sections. *United States* v. *Topco*, [405 U.S. 596 (1972)]; *Walker* v. *U-Haul Co. of Mississippi*, 747 F.2d 1011 (5th Cir. 1984)." Pet. App. A22. The court failed to modify its analysis of this issue on rehearing, although this Court's opinion in *Atlantic Richfield* was brought to its attention.

2. Although the court of appeals made no fewer than three legal errors, it is not clear that this case warrants plenary review. As we mentioned before, the decision of the court of appeals is unpublished. Although antitrust practitioners may be aware of the court of appeals' decision, it lacks any precedential effect. See Ninth Circuit

Rule 36-3 (unpublished memorandum decisions "shall not be regarded as precedent and shall not be cited to or by this court or any district court in the Ninth Circuit * * * except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel"). In addition, more specific considerations suggest caution in granting plenary review of any of the questions presented.

a. As to the *Copperweld* issue, we are aware of no published decision holding that wholly owned subsidiaries of a common parent can conspire with each other for purposes of Section 1. The Ninth Circuit's published rulings since *Copperweld* have either reserved the issue, see *Wilcox* v. *First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 527 (1987), or suggested that *Copperweld* should apply to corporate families including multiple wholly owned subsidiaries, see *Lake Communications* v. *ICC Corp.*, 738 F.2d 1473, 1480 (1984). And the four other circuits that have considered the question have had little difficulty concluding that the reasoning of *Copperweld* applies in this situation. *Odishelidze* v. *Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988); *Advanced Health-Care Serv., Inc.* v. *Radford Community Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990); *Greenwood Util. Comm'n* v. *Mississippi Power Co.*, 751 F.2d 1484, 1496 (5th Cir. 1985); *Directory Sales Management Corp.* v. *Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987). See also *Cohen* v. *Primerica Corp.*, 709 F. Supp. 63, 65 (E.D.N.Y. 1989). Cf. *City of Mt. Pleasant* v. *Associated Elec. Co-op.*, 838 F.2d 268, 274-277 (8th Cir. 1988) (under *Copperweld*, a group of related corporations comprising part of a rural electric cooperative are a single economic entity and cannot be found to have conspired).

In addition, the exact relationship among the BTR subsidiaries is less than elaborately developed in the record. Petitioners appear to have presented no evidence at trial on this issue; the only testimony to the relationship came from two of respondents' witnesses, over the objec-

tion of counsel for the Sorbothane petitioners. Tr. 962, 1676-1684. Neither witness professed any expertise in the corporate structure of the BTR companies and one, Laurene Heinsohn, conceded that her knowledge of the BTR corporate structure was hearsay. Tr. 962. Consequently, although the jury instruction upheld by the court of appeals allowed the jury to ignore the affiliation between subsidiaries if it concluded that they operated autonomously, the jury may have found a conspiracy because it did not believe that petitioners presented sufficient evidence of their affiliation.[11]

The panel's reasoning with respect to the *Copperweld* issue is nevertheless troubling. *Copperweld* goes to the heart of the manner in which families of related businesses conduct their operations. Thus, even an unpublished opinion improperly limiting *Copperweld* could have

[11] An additional uncertainty arises because the jury found the Sorbothane petitioners liable for two separate Section 1 violations—a horizontal agreement to divide markets and a vertical agreement to fix resale prices. Special Verdict Form XI-XII. It is difficult to determine whether the *Copperweld* error infected the jury's verdict on the resale price fixing claim. And the resale price fixing verdict alone would suffice to support the entire award of damages, which was the only relief awarded.

The jury found that the Sorbothane petitioners, but not the Spectrum petitioners, had engaged in resale price fixing. Special Verdict Form XI. Thus the jury's verdict, standing alone, would suggest that the jury thought the Sorbothane petitioners had conspired with themselves. But the district court instructed the jury that "resale price fixing * * * is an agreement between firms, at different levels of a chain of distribution to set the resale prices or price ranges for production." Tr. 4328. This raises the possibility that the jury concluded that the Sorbothane petitioners (the manufacturers) conspired to fix resale prices with independent distributors that were not named as defendants in this lawsuit. If that is so, the Section 1 verdict could stand despite the court's misapplication of *Copperweld*. The issue is further complicated, however, by the fact that IEM, one of Sorbothane's principal unaffiliated distributors, distributed medical products rather than athletic products. See Pet. App. A5-A6.

the effect of deterring lawful, procompetitive behavior by commonly owned firms. Consequently, although we do not believe the *Copperweld* issue merits plenary review, we believe it would be appropriate, should the Court wish to do so, summarily to reverse the decision of the court of appeals to the extent that it rests on a holding that wholly owned subsidiaries of a common parent can conspire with each other.

b. The *Lessig* doctrine conflicts with the law of every other circuit and has long been a source of confusion in attempted monopolization cases in the Ninth Circuit. We believe that the *Lessig* doctrine is incorrect, but it remains an established part of the law of the Ninth Circuit. The unpublished opinion in this case does not alter the state of the law.

At the same time, the court of appeals applied *Lessig* in a particularly expansive way by upholding the Section 2 verdict as to the Spectrum petitioners, who were not found to have committed a per se violation of Section 1 of the Sherman Act. That is quite troubling. In its *published* decisions, however, the Ninth Circuit has indicated that, in the absence of predatory or per se illegal conduct, "[m]arket analysis is essential because intent to exclude competition or control prices cannot exist in [a] vacuum; such intent only may exist within the framework of a definable market". *Thurman Indus.* v. *Pay 'N Pak Stores*, 875 F.2d 1369, 1378 (9th Cir. 1989). The court below simply did not discuss *Thurman* in applying *Lessig* to the Spectrum petitioners.

We also believe that the practical importance of *Lessig* has been diminished by the ruling in *Oahu Gas Service, Inc.* v. *Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), cert. denied, 488 U.S. 870 (1988). That case holds that potentially anticompetitive conduct will not necessarily lead to antitrust liability under Section 2 if there are legitimate business justifications for the conduct. Under *Oahu Gas*, the *Lessig* rule should not be used to

justify Section 2 liability for unilateral conduct that may be procompetitive.

There is another fact-specific consideration weighing in the *Lessig* balance. Although the *Lessig* issue is properly presented by each petition, it is not clear that rejection of the *Lessig* doctrine would alter the outcome of this case. The *Lessig* issue alone could make no difference to the outcome of the Sorbothane petitioners' case (No. 91-32) because they were found liable on two Section 1 counts. Either of those claims is sufficient to support the jury's entire damages award. The Spectrum petitioners (No. 91-10) were found liable for antitrust treble damages solely on the basis of Section 2. The jury, however, was properly instructed on the elements of monopolization and conspiracy to monopolize, and it appears that the evidence on those theories may be sufficient to support a Section 2 verdict.

c. In this error-ridden decision, the court of appeals—in deciding the issue of antitrust injury—failed even to acknowledge this Court's controlling decision in *Atlantic Richfield*. That case (which reversed another Ninth Circuit antitrust decision) was decided after briefing on the merits and oral argument, but before the court of appeals issued its decision in this case. Then, to compound its error, the court of appeals failed to modify its analysis even though *Atlantic Richfield* was specifically brought to the court's attention in the petition for rehearing, and even though the court modified another portion of its opinion.

We do not assume that the Ninth Circuit will continue to ignore *Atlantic Richfield*. Indeed, the Ninth Circuit has followed *Atlantic Richfield* in a recent published opinion. See *Datagate, Inc.* v. *Hewlett-Packard Co.*, 941 F.2d 864, 868 (1991). In addition, although the court of appeals in this case appears to have presumed antitrust injury from the combination of a per se violation of the antitrust laws and proof that respondents were injured

by petitioners' conduct, the key language of the court of appeals' opinion states only that "[*i*]*njury to competition* is presumed to follow from" per se antitrust violations. Pet. App. A22 (emphasis added). Standing alone, that statement is correct and does not conflict with *Atlantic Richfield*. See 495 U.S. at 342 ("*per se* rule is a presumption of unreasonableness"; a restraint is unreasonable if "its anticompetitive effects outweigh its procompetitive effects"). Moreover, respondents may well be correct in arguing (91-32 Br. in Opp. 17) that the evidence in this case justifies a finding of antitrust injury under the analysis of *Atlantic Richfield*. Despite these considerations, the court of appeals' failure even to acknowledge this Court's decision in *Atlantic Richfield* is striking. Accordingly, we believe it would be appropriate to vacate the court of appeals' decision and remand the case for further consideration in light of *Atlantic Richfield*.

CONCLUSION

For the reasons we have stated, plenary review is not warranted in this case. The Court may, however, wish summarily to reverse the decision of the court of appeals to the extent that it rests on a holding that wholly owned subsidiaries of a common parent may conspire for purposes of Section 1 of the Sherman Act and to remand for reconsideration of the antitrust injury issue in light of *Atlantic Richfield.*

Respectfully submitted.

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No. 91-10

In the Supreme Court of the United States

OCTOBER TERM, 1991

SPECTRUM SPORTS, INC., ET AL., PETITIONERS

v.

SHIRLEY MCQUILLAN AND LARRY MCQUILLAN
DBA SORBOTURF ENTERPRISES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether liability for attempted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, may be based solely on the defendant's conduct, without proof of a relevant market or the defendant's market power.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	7
Argument:	
Liability for attempted monopolization in violation of Section 2 of the Sherman Act may not be based on conduct alone, without regard to the structure of the relevant market	8
A. Proving attempted monopolization requires proof of a dangerous probability of monopolization	8
B. Establishing a dangerous probability of monopolization requires proof of a relevant market and a showing that the defendant has sufficient market power	19
C. The instructions improperly allowed the jury to find petitioners liable for attempted monopolization without regard to the probability of actual monopolization	23
Conclusion	24

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Cases:

Abbott Laboratories v. *Brennan*, 952 F.2d 1346 (Fed. Cir. 1991), petition for cert. pending, No. 91-1690	15
Abcor Corp. v. *AM Int'l, Inc.*, 916 F.2d 924 (4th Cir. 1990)	15
American Academic Suppliers, Inc. v. *Beckley-Candy, Inc.*, 922 F.2d 1317 (7th Cir. 1991)	22
American Tobacco Co. v. *United States*, 328 U.S. 781 (1946)	11
Arthur S. Langenderfer, Inc. v. *S.E. Johnson Co.*, 917 F.2d 1413 (6th Cir. 1990), cert. denied, 112 S. Ct. 274 (1991)	15

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Ball Memorial Hosp., Inc. v. *Mutual Hospital Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986) 17, 23
Cargill, Inc. v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) 16
C.A.T. Indus. Disposal, Inc. v. *Browning-Ferris Indus., Inc.*, 884 F.2d 209 (5th Cir. 1989) 15
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Commonwealth v. *Peaslee*, 59 N.E. 55 (Mass. 1901) 9
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CVD, Inc. v. *Raytheon Co.*, 769 F.2d 842 (1st Cir. 1985), cert. denied, 475 U.S. 1016 (1986) 15
Domed Stadium Hotel, Inc. v. *Holiday Inns, Inc.*, 732 F.2d 480 (5th Cir. 1984) 22
General Indus. Corp. v. *Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1987) 15
Griffin v. *United States*, 112 S. Ct. 466 (1991) 24
Harold Friedman, Inc. v. *Kroger Co.*, 581 F.2d 1068 (3d Cir. 1978) 15
Hyde v. *United States*, 225 U.S. 347 (1912) 10
Indiana Grocery, Inc. v. *Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989) 15, 21, 22
International Distrib. Centers v. *Walsh Trucking Co.*, 812 F.2d 786 (2d Cir.), cert. denied, 482 U.S. 915 (1987) 17
Janich Bros. v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978) 13
Key Enter. of Delaware, Inc. v. *Venice Hosp.*, 919 F.2d 1550 (11th Cir. 1990) 15
Lessig v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964) 5, 12, 13, 14
Lorain Journal Co. v. *United States*, 342 U.S. 143 (1951) 11
McLain v. *Real Estate Bd.*, 444 U.S. 232 (1980) 11
Monsanto Co. v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) 16

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National Reporting Co. v. *Alderson Reporting Co.*, 763 F.2d 1020 (8th Cir. 1985) 22
Neumann v. *Reinforced Earth Co.*, 786 F.2d 424 (D.C. Cir.), cert. denied, 479 U.S. 851 (1986) 15
Nifty Foods Corp. v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980) 22
Oahu Gas Serv., Inc. v. *Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), cert. denied, 488 U.S. 870 (1988) 13
Shoppin' Bag of Pueblo, Inc. v. *Dillon Cos., Inc.*, 783 F.2d 159 (10th Cir. 1986) 21
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) 12
Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) 24
Swift & Co. v. *United States*, 196 U.S. 375 (1905) 9, 10, 19, 23
Thurman Indus., Inc. v. *Pay 'N Pak Stores, Inc.*, 875 F.2d 1369 (9th Cir. 1989) 13
Twin Laboratories, Inc. v. *Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990) 15, 21
United States v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) 22
United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948) 12
United States v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) 12, 14
United States v. *Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977) 22
United States v. *Grinnell Corp.*, 384 U.S. 563 (1966) 14
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 11
United States v. *Yellow Cab Co.*, 332 U.S. 218 (1947) 12
Walker Process Equipment, Inc. v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) 10, 11
William Inglis & Sons Baking Co. v. *Continental Baking Co.*, 942 F.2d 1332 (9th Cir. 1991) 21

Cases—Continued: Page

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Statutes:

Clayton Act, 15 U.S.C. 12 *et seq.*:
§ 3, 15 U.S.C. 14 3
§ 4, 15 U.S.C. 15 4
Sherman Act, 15 U.S.C. 1 *et seq.*:
§ 1, 15 U.S.C. 1 ..... 1, 3, 6, 7, 11, 17, 18
§ 2, 15 U.S.C. 2 ..... *passim*
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18 U.S.C. 1962 3
18 U.S.C. 1964(c) 4
Cal. Bus. & Prof. Code § 17200 (West 1987) 4
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§ 16750 4
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Vol. 2 20
Vol. 3 ..... 9, 15, 18, 20, 23
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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States is principally responsible for enforcing the Sherman Act, 15 U.S.C. 1 and 2. The United States has a strong interest in this Court's resolution of the question presented in this case, which will affect public and private enforcement of the federal antitrust laws. At the Court's invitation, the United States filed a brief in this case at the certiorari stage.

STATEMENT

1. Sorbothane is a patented elastic polymer with shock-absorbing characteristics. It is used in a variety of medical, athletic, and equestrian products.

Respondents Shirley and Larry McQuillan, doing business as Sorboturf Enterprises, were regional distributors of sorbothane products from 1981 to mid-1983. Shirley McQuillan was also active in efforts to develop equestrian products made from sorbothane. Petitioner Spectrum Sports, Inc. (Spectrum), was at all relevant times a distributor of sorbothane products. Petitioner Kenneth B. Leighton, Jr., is a co-owner of Spectrum. Pet. App. A3-A7.

In 1980, respondents contacted the British manufacturers of sorbothane to discuss the possibility of using sorbothane in horseshoe pads. Pet. App. A4. Respondents were referred to Hamilton-Kent Manufacturing Company, which controlled the rights to manufacture and distribute sorbothane in the United States. Petitioner Leighton was then Hamilton-Kent's vice president of marketing. Respondents and Hamilton-Kent signed a letter of intent that granted respondents the exclusive right to purchase sorbothane for use in equestrian products. *Ibid.*

While respondents were developing a sorbothane horseshoe pad, Hamilton-Kent was exploring other potential markets for sorbothane in the United States, including athletic shoe inserts and medical products. In mid-1981, Hamilton-Kent decided to establish a network of five regional distributors of sorbothane products. Hamilton-Kent selected respondents to distribute all sorbothane products, including shoe inserts and medical products, in the southwestern United States. Spectrum was chosen as one of the other regional distributors. The distributors began selling sorbothane products in September 1981. Pet. App. A5.

In January 1982, Hamilton-Kent shifted responsibility for selling medical products from the five regional distributors to a single national distributor. In

April 1982, and again in May 1982, Hamilton-Kent told respondents that it wanted them to relinquish their athletic shoe distributorship as a condition for retaining the right to develop and distribute equestrian products. Respondents refused, and continued to place and receive orders for athletic shoe inserts. Pet. App. A5-A6.

By the fall of 1982, Sorbothane, Inc., had assumed Hamilton-Kent's manufacturing rights to sorbothane. (Both Hamilton-Kent and Sorbothane, Inc., are wholly owned subsidiaries of BTR, Inc., which controls the patent rights to sorbothane. Pet. App. A3.) Sorbothane, Inc., selected a national equestrian distributor and prohibited respondents from distributing equestrian products. In January 1983, Sorbothane, Inc., began marketing through its national distributor a horseshoe pad based on respondents' design. *Id.* at A7. On August 1, 1983, Sorbothane, Inc., informed respondents that it would no longer accept their orders for any sorbothane products. Spectrum was named the exclusive national distributor of athletic shoe inserts. *Ibid.*; Pet. 6.

Respondents then sought to purchase sorbothane from the British manufacturer, Leyland and Birmingham. (Leyland and Birmingham, like Sorbothane, Inc., is a wholly owned subsidiary of BTR, Inc.) Leyland and Birmingham refused to sell sorbothane in the United States. Lacking a source of sorbothane, respondents' distributorship failed. Pet. App. A8.

2. Respondents sued petitioners seeking damages for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, Section 3 of the Clayton Act, 15 U.S.C. 14, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962,

California's unfair competition law, Cal. Bus. & Prof. Code § 17200 (West 1987), and the California Cartwright Act, Cal. Bus. & Prof. Code § 16750 (West 1987 & Supp. 1992). Respondents also alleged that petitioners were liable for fraud, breach of contract, interference with prospective business advantage, bad faith denial of the existence of an oral contract, and conversion. See R.E. 1-47 (Second Amended Complaint).[1]

At the conclusion of the trial, the jury found that petitioners had violated Section 2—but not Section 1—of the Sherman Act. The jury also found that petitioners were liable for interference with prospective business advantage and for violations of RICO and California's unfair competition law. The jury awarded respondents $1,743,000 in compensatory damages on all claims and awarded an additional $500,000 in punitive damages, which respondents waived. The district court trebled the compensatory damages pursuant to Section 4 of the Clayton Act, 15 U.S.C. 15, RICO, 18 U.S.C. 1964(c), and the California Cartwright Act, Cal. Bus. & Prof. Code § 16750(a) (West 1987 & Supp. 1992), and awarded an additional $912,032.50 in attorneys' fees pursuant to Section 4 of the Clayton Act. Petitioners moved for judgment notwithstanding the verdict and for a new trial; the district court denied the motions. Pet. App. A2, A30-A31; Special Verdict Form I-XIX.

3. The Ninth Circuit affirmed in an unpublished memorandum decision. Pet. App. A1-A28. Because the jury awarded the same damages on all claims

[1] Respondents sued, in addition to petitioners, Sorbothane, Inc., Hamilton-Kent, BTR, Inc., and Kenneth M. Leighton, Sr. Those additional defendants have filed a separate petition for a writ of certiorari, No. 91-32.

against petitioners, the court observed that affirming a single trebled claim against each petitioner was sufficient to affirm the judgment. *Id.* at A27-A28.

The court of appeals noted that the district court had not required the jury to specify whether its finding that petitioners were liable under Section 2 of the Sherman Act was based on monopolization, attempted monopolization, or conspiracy to monopolize. Pet. App. A15. The court of appeals concluded that the jury's verdict could stand if the evidence supported any of the three possible bases for Section 2 liability. *Ibid.* The court proceeded to consider only the attempted monopolization claim.

The court rejected petitioners' argument that the evidence was not sufficient to support a verdict for respondents on the attempted monopolization claim because respondents had failed to present evidence of petitioners' specific intent to monopolize a relevant market, or evidence that Spectrum's attempt to monopolize was likely to succeed because it possessed substantial market power in a relevant market. Relying on its decision in *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964), the court concluded (Pet. App. A19) that no such evidentiary showing is required, because "dangerous probability of success * * * may be inferred from proof of specific intent, which in turn may be inferred from conduct." *Id.* at A17. The court of appeals therefore upheld the district court's instruction to the jury that "evidence of unfair or predatory conduct * * * may satisfy both the specific intent and dangerous probability elements of the offense [of attempted monopolization], without any

proof of relevant market or the defendant's market-power." *Id.* at A19.[2]

The court of appeals concluded that the evidence was sufficient to establish that petitioners engaged in unfair or predatory conduct, despite the jury's determination that petitioners—unlike the other defendants—had not engaged in conduct that violated Section 1 of the Sherman Act. Pet. App. A21. Accordingly, the court held that respondents were not required to establish a relevant market or prove that petitioners had market power. *Ibid.*

On petition for rehearing, the court of appeals amended its opinion to delete a statement that petitioners had failed to object to the jury instruction incorporating the *Lessig* holding. Pet. App. A32-A33.

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[2] The district court instructed the jury as follows:

> In order to win on the claim of attempted monopoly, the plaintiff must prove each of the following elements by a preponderance of the evidence: First, that the defendants had a specific intent to achieve monopoly power in the relevant market; second, that the defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent; third, that there was a dangerous probability that defendants could sooner or later achieve its [*sic*] goal of monopoly power in the relevant market; fourth, that the defendants' conduct occurred in or affected interstate commerce; and, fifth, that the plaintiff was injured in the [*sic*] business or property by the defendants' exclusionary or restrictive conduct. * * * If the plaintiff has shown that the defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element [*sic*] of the offense without any proof of relevant market or the defendants' marketing [*sic*] power.

Tr. 4349-4350.

SUMMARY OF ARGUMENT

The court of appeals affirmed the judgment against petitioners solely on the basis of its *Lessig* rule, which allows a trier of fact to infer both specific intent to monopolize and dangerous probability of success from "unfair" or "predatory" conduct alone. That rule is unsound. It allows the trier of fact to impose liability for attempted monopolization without considering the actual probability of monopolization. Section 2 of the Sherman Act, unlike Section 1, applies to the conduct of a single firm. Efficient and beneficial competition is often difficult to distinguish from predatory conduct; successful competitors inevitably disadvantage their rivals, who may well view the tactics of their marketplace opponents as unfair. Consequently, unilateral conduct is unlawful under Section 2 only when that conduct threatens actual monopolization. Proof of a claim of attempted monopolization must, accordingly, include a threshold showing that the defendant's alleged conduct posed a realistic threat of actual monopolization.

Probability of actual monopolization can be appropriately assessed only by defining a relevant market and evaluating the challenged conduct in the context of that market. No matter how improper the defendant's conduct, a defendant cannot exercise monopoly power over a group of products or a geographic area that does not constitute a relevant market. Such market characteristics as market share and potential for entry must be considered in evaluating the probability of actual monopolization.

Moreover, in considering the intent element of attempted monopolization, it is essential that the trier of fact be required to determine whether the defendant specifically intended to monopolize, as opposed to

intending to disadvantage rivals. That determination requires consideration of procompetitive justifications for the challenged conduct.

This carefully established framework of Section 2 analysis is jettisoned under the Ninth Circuit's much-criticized *Lessig* decision. The *Lessig* rule allows the trier of fact to impose liability for attempted monopolization solely on the basis of the defendant's conduct, viewed in isolation from the realities of the marketplace. That is not only counterintuitive, it is contrary to the basic purpose of the antitrust laws. As a substantive principle of antitrust law, the *Lessig* rule is more likely to chill legitimate competition than to further the procompetitive goals underlying the Sherman Act. Yet, the court of appeals affirmed the district court's judgment solely on *Lessig* grounds. That resolution was wrong, and the Ninth Circuit's judgment should be reversed.

ARGUMENT

LIABILITY FOR ATTEMPTED MONOPOLIZATION IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT MAY NOT BE BASED ON CONDUCT ALONE, WITHOUT REGARD TO THE STRUCTURE OF THE RELEVANT MARKET

A. Proving Attempted Monopolization Requires Proof of a Dangerous Probability of Monopolization

1. Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine * * *, or by imprisonment * * *, or by both said punishments.

15 U.S.C. 2. Section 2 creates three offenses—monopolization, attempted monopolization, and conspiracy to monopolize—but does not define any of them. Nor does the sparse legislative history of Section 2 shed light on the nature of the offense of attempted monopolization. With little discussion, Section 2 was added to the Sherman bill late in the legislative process. See 1 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 23-25 (1978); 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 617, at 39 (1978). It is nevertheless well established that the offense of attempted monopolization requires both intent to monopolize and a dangerous probability of success.

This Court first addressed the meaning of the attempt provision of Section 2 in *Swift & Co.* v. *United States*, 196 U.S. 375 (1905). Drawing on the criminal law of attempts, Justice Holmes's opinion for the Court concluded:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. * * * But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.

196 U.S. at 396 (citing *Commonwealth* v. *Peaslee*, 59 N.E. 55 (Mass. 1901)). Although the Court's refer-

ence in *Swift* to "intent and the *consequent* dangerous probability" of monopolization might be read to suggest that intent to monopolize alone is sufficient to prove a dangerous probability of success, the Court made clear elsewhere in its opinion that specific intent and dangerous probability are distinct elements of the offense of attempted monopolization. The Court specifically explained that "[n]ot every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree." 196 U.S. at 402. *Swift* therefore establishes that a dangerous probability of achieving monopoly, as well as intent to achieve that end, are essential elements of the offense of attempted monopolization.[3]

The Court's more recent discussions of attempted monopolization reaffirm the importance of proving a dangerous probability of actual monopolization. In *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965), the Court held that enforcing a fraudulently obtained patent may violate the Sherman Act in certain circumstances. In discussing the application of Section 2 on remand, the Court stated that a claim of monopolization or attempted monopolization would require a court to "appraise the exclusionary power of the

[3] Justice Holmes restated the *Swift* test in a way that reinforces that point in a subsequent opinion in which he dissented on other grounds:

> [C]ombination, intention and overt act may all be present without amounting to a criminal attempt—as if all that were done should be an agreement to murder a man fifty miles away and the purchase of a pistol for the purpose. There must be dangerous proximity to success.

Hyde v. *United States*, 225 U.S. 347, 387-388 (1912) (Holmes, J., dissenting).

illegal patent claim in terms of the relevant market for the product involved." 382 U.S. at 177. The Court explained that "[w]ithout a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition." *Ibid.* The Court has also emphasized the fundamental distinction between Section 2 of the Sherman Act, which is directed primarily to unilateral conduct, and Section 1 of that Act, which is directed to concerted activity. *Copperweld Corp* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). Because unilateral conduct is less likely than concerted activity to threaten competition, the Court concluded that "[t]he conduct of a single firm * * * is unlawful only when it threatens actual monopolization." 467 U.S. at 767.[4] See also *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 154 (1951) (firm that "already enjoy[s] a substantial monopoly * * * violates the 'attempt to monopolize' clause of § 2 when it uses its monopoly to destroy threatened competition"); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 785 (1946) (quoting jury instruction that attempt to monopolize means "the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it").[5]

[4] In contrast, a horizontal conspiracy to fix prices—*i.e.*, collaborative activity—does not require proof that the conspirators were capable of achieving their objective. See *McLain* v. *Real Estate Bd.*, 444 U.S. 232, 243 (1980); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-225 n.59 (1940).

[5] Although statements in some of the Court's prior opinions have been cited as authority for the proposition that proof of attempted monopolization does not require a showing of a

2. The court of appeals based its Section 2 ruling on its earlier decision in *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964). The facts in *Lessig* were these: The plaintiff leased a service station from Tidewater Oil Company. Lessig alleged that Tidewater had violated the antitrust laws by (1) fixing the prices at which its dealers resold gasoline, and (2) requiring its dealers to purchase petroleum products, tires, batteries, and accessories exclusively from Tidewater. The jury returned a verdict for Tidewater, and *Lessig* appealed. On appeal, Tidewater argued that it was not liable for attempted monopolization unless Lessig proved a "dangerous probability of success," and that such proof "requires an evaluation of Tidewater's power in the relevant market." 327 F.2d at 474.

The court of appeals in *Lessig* "reject[ed] the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize." 327 F.2d at 474. Although the court acknowledged that the probability of actual monopolization may be relevant to prove the defendant's intent, it concluded that "specific intent itself is the only evidence of dangerous probability the statute requires—

dangerous probability of success, the Court has never accepted that proposition. In *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 532 (1948), and *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 226 (1947), the Court neither expressly considered that question nor imposed liability for attempted monopolization. In *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), the Court stated in a footnote (*id.* at 395 n.23) that "the scope of the market was not in issue" in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). In *Story Parchment*, however, the market was not "in issue" in this Court because the parties did not challenge the market definition adopted by the lower courts. See 282 U.S. at 559.

perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." *Ibid.*

In subsequent cases, the Ninth Circuit has held that a specific intent to monopolize may be inferred from the defendant's conduct. See, *e.g.*, *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1029 n.11 (1981), cert. denied, 459 U.S. 825 (1982); *Janich Bros.* v. *American Distilling Co.*, 570 F.2d 848 (1977), cert. denied, 439 U.S. 829 (1978). The *Lessig* doctrine thus allows the finder of fact to draw a "double inference"—inferring specific intent from conduct, and then inferring dangerous probability of success from specific intent. The result is that, under *Lessig*, proof of "unfair" or "predatory" conduct alone is sufficient to prove attempted monopolization. Pet. App. A19.[6]

The court of appeals' reasoning in support of the *Lessig* rule is unpersuasive. The *Lessig* court quoted (327 F.2d at 474 n.46) this Court's reference in

[6] The Ninth Circuit has not been entirely consistent in applying the *Lessig* rule. In *Oahu Gas Serv., Inc.* v. *Pacific Resources, Inc.*, 838 F.2d 360, cert. denied, 488 U.S. 870 (1988), the Ninth Circuit held that potentially anticompetitive conduct will not necessarily lead to antitrust liability under Section 2 if there are legitimate business justifications for the conduct. Under *Oahu Gas*, the *Lessig* rule should not be used to impose Section 2 liability for unilateral conduct that may be procompetitive. Moreover, at least one recent Ninth Circuit decision recognizes the importance of market analysis in determining Section 2 liability. *Thurman Indus., Inc.* v. *Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1378 (1989). But the Ninth Circuit has never repudiated the *Lessig* doctrine. And as this case illustrates, some Ninth Circuit decisions continue to impose liability for attempted monopolization without any market analysis or consideration of the procompetitive justifications for the defendant's conduct.

Swift to "intent and the *consequent* dangerous probability" of success, and cited (327 F.2d at 474) footnote 23 of this Court's opinion in *United States* v. *du Pont & Co.* for the proposition that the relevant market is "not in issue" in an attempted monopolization case. Neither *Swift* nor *du Pont* supports *Lessig*'s odd analysis. As we have explained, *Swift* established that specific intent and dangerous probability of success are separate elements of the attempted monopolization offense. The *du Pont* decision did not overrule *Swift*; and the Court subsequently reaffirmed the rule of *Swift* in *Walker Process* and again in *Copperweld*.

The *Lessig* court also relied on the language of Section 2, which prohibits monopolizing, attempting to monopolize, or conspiring to monopolize "any part of the trade or commerce among the several States." The court interpreted this language to mean that Section 2 reaches any attempt to monopolize "an appreciable segment of interstate sales." 327 F.2d at 475. But the "any part of trade or commerce" language applies to monopolization as well as to attempts to monopolize, and it is well established that proving monopolization requires proof of substantial market power in a relevant market. See *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571 (1966); *United States* v. *du Pont & Co.*, 351 U.S. at 404. By expanding the offense of attempted monopolization to include conduct that does not create a realistic probability of actual monopolization, the *Lessig* rule converts many garden-variety business torts into federal antitrust violations. Moreover, *Lessig*'s expansive reading of the statutory language would imply that any arrangement that affects an appreciable segment of sales—including vertical integration, vertical mergers, and requirements contracts—would violate Section 2.

See 3 P. Areeda & D. Turner, *supra*, ¶ 811, at 298. This Court's antitrust jurisprudence precludes interpreting Section 2 to wreak such extreme results.

The *Lessig* rule thus rests on unsound legal foundations. In addition, *Lessig* is at odds with the procompetitive purposes of the Sherman Act. As a substantive principle of antitrust law, the *Lessig* rule is more likely to chill legitimate competition than to invigorate it. Consequently, it is not surprising that *Lessig* has been rejected by every other court of appeals,[7] and roundly criticized by commentators.[8]

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[7] See *CVD, Inc.* v. *Raytheon Co.*, 769 F.2d 842, 851 (1st Cir. 1985), cert. denied, 475 U.S. 1016 (1986); *Twin Laboratories, Inc.* v. *Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990); *Harold Friedman, Inc.* v. *Kroger Co.*, 581 F.2d 1068, 1079 (3d Cir. 1978); *Abcor Corp.* v. *AM Int'l, Inc.*, 916 F.2d 924, 926, 931 (4th Cir. 1990); *C.A.T. Indus. Disposal, Inc.* v. *Browning-Ferris Indus., Inc.*, 884 F.2d 209, 210 (5th Cir. 1989); *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 917 F.2d 1413, 1431 (6th Cir. 1990), cert. denied, 112 S. Ct. 274 (1991); *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409, 1413-1416 (7th Cir. 1989); *General Indus. Corp.* v. *Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987); *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co. of America*, 885 F.2d 683, 693 (10th Cir. 1989), cert. denied, 111 S. Ct. 441 (1990); *Key Enter. of Delaware, Inc.* v. *Venice Hosp.*, 919 F.2d 1550, 1565 (11th Cir. 1990); *Neumann* v. *Reinforced Earth Co.*, 786 F.2d 424, 428-429 (D.C. Cir.), cert. denied, 479 U.S. 851 (1986); *Abbott Laboratories* v. *Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991), petition for cert. pending, No. 91-1690 (filed Apr. 23, 1992).

[8] See, *e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 832.1 (Supp. 1991); 2 E. Kintner, *Federal Antitrust Law* § 13.4 (1980 & Supp. 1992); Areeda, *Monopolization, Mergers and Markets: A Century Past and the Future*, 75 Cal. L. Rev. 959, 970-975 (1987); Gifford, *The Role of the Ninth Circuit in the Development of the Law of Attempt to Monopolize*, 61 Notre Dame L. Rev. 1021 (1986); Handler, *Reforming the Antitrust Laws*, 82 Colum. L. Rev. 1287, 1352-1357

3. The fundamental defect of the *Lessig* rule is that it undermines the procompetitive purposes of the Sherman Act. As the Court explained in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. at 767-768, an allegation that unilateral conduct violates the Sherman Act must be evaluated with caution because "it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects." See also *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 762 (1984); *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 116-117 (1986). An efficient, vigorous competitor may "capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result." *Copperweld*, 467 U.S. at 767. From the perspective of the firm that cannot keep pace, the efficient competitor's tactics may appear to be "unfair" or "predatory." Yet, "[t]his is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims

(1982); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 373 (1974); Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. Antitrust L.J. 165, 171 (1967). It has been suggested that a law review article by Professor Turner "is very much responsible" for *Lessig*. See Cooper, 72 Mich. L. Rev. at 409 (quoting Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281, 305-307 (1956)). But Professor Turner has disavowed support for *Lessig*. See Turner, *The Scope of "Attempt to Monopolize"*, 30 Record of the Bar Ass'n of the City of N.Y. 487, 488 (1975) ("traditional formulation of the attempt offense, closely tying it to monopolization, is basically correct"), 506 n.21 (expressing regret that "imprecise statements in an earlier article * * * have apparently contributed to * * * an undue broadening of the 'attempt' offense").

to foster." *Ibid.* For these reasons, unilateral conduct subject to Section 2—in contrast to concerted action subject to Section 1, which "inherently is fraught with anticompetitive risk" (467 U.S. at 768) and therefore is condemned in certain circumstances as per se illegal—"is unlawful only when it threatens actual monopolization." 467 U.S. at 767. As the Seventh Circuit observed in *Ball Memorial Hosp. Inc.* v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (1986):

> Competition is a ruthless process. * * * The deeper the injury to rivals, the greater the potential benefit [to consumers]. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. * * * [Accordingly, Section 2] must be used with the greatest caution. Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition, and to deter aggressive conduct is to deter competition.

Because it is often difficult to characterize a firm's conduct for antitrust purposes, and because it is relatively easy for plaintiffs to bring a lawsuit under Section 2, eliminating the requirement that plaintiffs show a dangerous probability of success "might discourage the healthy competition that section 2 is intended to nurture * * * and deter businesses from aggressively expanding into new markets." *International Distrib. Centers* v. *Walsh Trucking Co.*, 812 F.2d 786, 791 (2d Cir.), cert. denied, 482 U.S. 915 (1987). Accordingly, only if the trier of fact is required to determine whether the challenged conduct threatens actual monopolization can there be reasonable assurance that the verdict will promote, rather

than inhibit, competition. See 3 P. Areeda & D. Turner, *supra*, ¶ 833, at 342 (describing "potentially devastating effect" on competition of applying Section 2 to defendants without substantial market power).[9]

Outside the Ninth Circuit, the courts of appeals are in agreement that a plaintiff cannot establish a dangerous probability of monopolization simply by proving conduct. Instead, the plaintiff must show that (1) the defendant intended to monopolize a relevant market, (2) the defendant engaged in anticompetitive or exclusionary conduct in furtherance of that intent, and (3) there was a dangerous probability that the defendant would achieve monopoly power in the relevant market. See note 7, *supra*; 3 P. Areeda & D. Turner, *supra*, ¶ 820, at 312. Because proof of a dangerous probability of monopolization is necessary to further the procompetitive purposes of the Sherman Act, we believe that the courts of appeals other than the Ninth Circuit have correctly formulated the elements of the attempted monopolization offense.[10]

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[9] As this case illustrates, the boundaries of "predatory" conduct can be elusive. Although the jury rejected respondents' claim under Section 1 of the Sherman Act that petitioners participated in a conspiracy in unreasonable restraint of trade, the court of appeals nevertheless concluded that the evidence offered in support of the Section 1 claim was sufficient to establish "predatory" conduct for purposes of the attempted monopolization claim. See Pet. App. A21.

[10] The Model Penal Code bases criminal liability for attempt on "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the] commission of the crime." Model Penal Code § 5.01(1)(c) and (2) at 81 (Proposed Official Draft 1962). In many criminal contexts, the Model Penal Code states the appropriate standard of liability for attempt. But the "proximity approach" adopted by

B. Establishing a Dangerous Probability of Monopolization Requires Proof of a Relevant Market and a Showing That the Defendant Has Sufficient Market Power

1. In order to assess the probability that a defendant's activities will have anticompetitive effects, the finder of fact must place them in the context of a relevant market. Even conduct that is unambiguously tortious or otherwise clearly improper may not threaten the vitality of competition in the market. For example, the firm engaging in improper conduct may be a very small player whose actions have little effect on the market. Or it may be clear that any attempt to exercise market power would promptly attract substantial new entry that would force prices back down. Consequently, evidence of conduct alone, in the absence of evidence about the market, cannot reliably predict the probability of actual monopolization. Of course, we do not suggest that tortious or otherwise improper conduct must go unpunished merely because it does not threaten harm to competition. Much of state tort law is designed to remedy just such conduct. In this case, for example, respondents challenged petitioners' conduct under a variety of California laws in addition to the federal antitrust laws.[11]

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this Court in *Swift & Co.* v. *United States* remains in use. See 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 6.2(d), at 31-34 (1986). At all events, abandoning the dangerous probability requirement in the context of Section 2 of the Sherman Act would be inappropriate because of the risk that a relaxed standard would deter legitimate procompetitive conduct.

[11] Professors Areeda and Turner have suggested that a very narrow category of unilateral activity might be held to violate Section 2 without requiring any market analysis. Such activity would (1) be "totally unrelated to competition on the

2. The definition of a relevant market is central to the proper analysis of attempted monopolization claims. Market definition in Section 2 cases is the process of identifying a product or group of products and a geographical area in which a hypothetical monopolist could exercise market power—*i.e.*, charge a price above the competitive level for a significant period of time.[12] If a seller attempts to charge a monopoly price for a product or in a geographic area that is too narrowly drawn to constitute a market, the seller's attempt will prove unprofitable because too many consumers will shift to other products or sellers. A seller who attempts to monopolize something narrower than a relevant market cannot cause significant economic harm. See 2 P. Areeda & D. Turner, *supra*, ¶ 517, at 346-347 (1978). Thus, the definition of a

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merits," (2) "clearly impl[y] the presence or prospect of some durable degree of market power" and (3) have "potentially significant exclusionary effects." See 3 P. Areeda & D. Turner, *supra*, ¶ 836, at 352. Areeda and Turner suggest that examples of such activity might include predatory pricing and fraudulent procurement of an invalid patent. *Id.* at 353. Because the court of appeals did not suggest that this case involves any such activity, there is no need for the Court to consider whether there may be a narrow exception to the general requirement of market analysis in attempted monopolization cases. It is our view that the anticompetitive effects of such an exception would probably outweigh its benefits. In many cases, it would be difficult to determine whether particular conduct satisfied the Areeda and Turner (or similar) criteria. Consequently, an exception to the market analysis requirement, like the *Lessig* rule itself, might deter vigorous competition by individual firms.

[12] "[M]onopoly power" is simply a high degree of market power. See Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 937 (1981).

relevant market is an essential first step in analyzing a claim of attempted monopolization.

Once the relevant market has been defined, it is possible to consider whether the defendant has sufficient power in that market to create a dangerous probability that it will succeed in monopolizing. One significant indicator of such power is the defendant's market share. See *Twin Laboratories, Inc.* v. *Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990); *Shoppin' Bag of Pueblo, Inc.* v. *Dillon Cos., Inc.*, 783 F.2d 159, 161 (10th Cir. 1986). In general, "[t]he higher the firm's initial market share, the greater the likelihood that it will eventually gain monopolistic control over the market." *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co. of America*, 885 F.2d 683, 694 (10th Cir. 1989), cert. denied, 111 S. Ct. 441 (1990) (citing *Shoppin' Bag*, 783 F.2d at 162).

Market share, however, must be placed in context; the structure of the market can also affect significantly a firm's ability to monopolize. *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409, 1414 (7th Cir. 1989). For example, there may be a dangerous probability that a firm will monopolize a market with high barriers to entry or with little excess capacity, even though a firm with the same market share might have no realistic possibility of monopolizing a market with greater excess capacity or substantially lower entry barriers. See Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. at 944-951; *William Inglis & Sons Baking Co.* v. *Continental Baking Co.*, 942 F.2d 1332, 1347-1348 (9th Cir. 1991) (Noonan, J. concurring in part, dissenting in part).[13]

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[13] Most courts of appeals that have considered the issue have required substantial market share on the part of the

The probability of actual monopolization ordinarily should be considered as a threshold matter in an attempted monopolization case. If it is clear that the defendant firm's position in the relevant market does not afford it a significant possibility of monopolizing, there is no violation of Section 2 regardless of the nature of the conduct. At that point, there is no reason for the inquiry to proceed further, and judgment for the defendant is appropriate. See *National Reporting Co.* v. *Alderson Reporting Co.*, 763 F.2d 1020, 1025 (8th Cir. 1985). By treating the probability of actual monopolization as a threshold matter, the courts will eliminate the need for time-consuming and expensive inquiries into the defendant's conduct and intent in some cases.

3. As the Court explained in *Swift*, specific intent is also an essential element of attempted monopolization. Section 2 of the Sherman Act is not a no-fault statute; it reaches only conduct that causes monopolization through improper means. See *United States* v.

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defendant in order to prove a dangerous probability of success. See, *e.g.*, *Colorado Interstate Gas*, 885 F.2d at 694-695 (41% share not enough in face of evidence that defendant could never actually succeed); *Indiana Grocery*, 864 F.2d at 1414 (nearly 50% share not enough); *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980) (33% share not enough); *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 305 (8th Cir. 1976) (50% share not enough), cert. denied, 429 U.S. 1122 (1977). Cf. *American Academic Suppliers, Inc.* v. *Beckley-Cardy, Inc.*, 922 F.2d 1317, 1319-1320 (7th Cir. 1991) ("[T]o be guilty of attempted monopolization a defendant must have monopoly power (because otherwise his attempt does not have a dangerous probability of succeeding)"). But see *Domed Stadium Hotel, Inc.* v. *Holiday Inns, Inc.*, 732 F.2d 480, 490-491 (5th Cir. 1984) (less than 10% share may be enough where "special market conditions" exist).

Aluminum Co. of America, 148 F.2d 416, 429-430 (2d Cir. 1945). Intent for purposes of Section 2 should not be confused with mere intent to cause harm to a competitor; any firm embarked on a course of vigorous competition hopes to take customers away from its rivals. *Ball Memorial*, 784 F.2d at 1335-1336. Yet the *Lessig* standard, which makes no provision for consideration of procompetitive justifications for the defendant's conduct, lends itself to such confusion. Because direct evidence of intent to monopolize will seldom be available, it will often be necessary to make inferences about a defendant's intent from the nature of its conduct. But the trier of fact should be required to consider procompetitive justifications for the conduct at issue and to determine whether the defendant specifically intended not just to disadvantage a rival, but to monopolize the relevant market.[14]

C. The Instructions Improperly Allowed the Jury to Find Petitioners Liable for Attempted Monopolization Without Regard to the Probability of Actual Monopolization

The court of appeals affirmed the judgment against petitioners on the Section 2 claim solely on the basis of the *Lessig* doctrine. Because the jury instructions on attempted monopolization and the court of appeals' affirmance of the Section 2 verdict were based on *Lessig*, there are no findings concerning the relevant

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[14] Some commentators have suggested that proof of intent to monopolize is unimportant or unnecessary as a matter of antitrust policy. See 3 P. Areeda & D. Turner, *supra*, ¶¶ 821-822 at 313-316; Cooper, 72 Mich. L. Rev. at 398-400. But it has been settled since this Court's decision in *Swift & Co.* v. *United States*, *supra*, that intent to monopolize is an element of the offense of attempted monopolization. Moreover, criminal liability for attempt generally requires an intent to commit the substantive offense. See 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 6.2(c), at 24-26 (1986).

market, the extent of Spectrum's market power, or any procompetitive justifications for petitioners' conduct.

It is possible that the jury's verdict was not based on an attempt to monopolize theory, but rather on a finding that petitioners monopolized or conspired to monopolize. But the jury was not asked to specify the basis for its Section 2 verdict, and therefore it is also possible that its verdict was based solely on the attempt claim. Accordingly, the Section 2 judgment should be reversed. See *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962). Cf. *Griffin* v. *United States*, 112 S. Ct. 466, 472-474 (1991) (distinguishing, in criminal context, factual insufficiency from legal inadequacy).

CONCLUSION

The judgment of the court of appeals on the Section 2 claim should be reversed.

Respectfully submitted.

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No. 91-10

In The

Supreme Court of the United States

October Term, 1992

SPECTRUM SPORTS, INC. and
KENNETH B. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENT TO JOINT APPENDIX

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TABLE OF CONTENTS

Page

INTRODUCTION 437

PLAINTIFFS' PROPOSED INSTRUCTION NO. 124 ... 438

PLAINTIFFS' PROPOSED INSTRUCTION NO. 125 ... 440

PLAINTIFFS' PROPOSED INSTRUCTION NO. 126 ... 442

PLAINTIFFS' PROPOSED INSTRUCTION NO. 127 ... 444

PLAINTIFFS' PROPOSED INSTRUCTION NO. 128 ... 446

INTRODUCTION

This supplement to the Joint Appendix contains copies of Plaintiffs Proposed Instructions No. 124-128 as they were read to the jury by the trial judge in open court. J.A. 251-256 is a transcription of the reporters transcript of these instructions which mistranscribed what was read by the trial judge in several material respects. This is shown by a review of J.A. 246-250 setting forth the discussion between counsel and the trial judge as to the final instructions to be given and R. 4389-4393 identifying those instructions that were incorrectly read by the court.

PLAINTIFFS' PROPOSED INSTRUCTION NO. 124

ATTEMPT TO MONOPOLIZE

Elements

~~Even if you do not find that defendants monopolized the relevant market, you may still find that they illegally attempted to monopolize the market.~~[1] Plaintiff *also*[2] alleges that it was injured by defendants' unlawful attempt to monopolize. In order to win on its claim of attempted monopolization, plaintiffs must prove each of the following elements by a preponderance of the evidence:

First, that defendants had a specific intent to achieve monopoly power in a relevant market;

Second, that defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent;

Third, that there was a dangerous probability that defendants would sooner or later achieve its goal of monopoly power in the relevant market;

Fourth, that defendants' conduct occurred in or affected interstate commerce; and

Fifth, that plaintiff was injured in her business or property by defendants' exclusionary or restrictive conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for

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[1] Deleted by Court. J.A. 248.

[2] Added by Court. J.A. 248.

defendants and against plaintiff on plaintiff's attempt to monopolize claim.

If plaintiff has shown that defendants engaged in predatory conduct you may infer from that evidence the specific intent and the dangerous probability elements of the offense, without any proof of relevant market or the defendants' market power.

AUTHORITIES:

Lassig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); American Bar Association Section of Antitrust Law, *Sample Jury Instructions in Civil Antitrust Cases*, Attempt to Monopolize – Instruction 1, p. C-87 (1987).

GIVEN AS REQUESTED _____

GIVEN AS MODIFIED _____

REFUSED _____

WITHDRAWN _____

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JUDGE, FEDERAL
DISTRICT COURT

PLAINTIFFS' PROPOSED INSTRUCTION NO. 125

ATTEMPT TO MONOPOLIZE

Specific Intent

In this case, plaintiff argues that the conduct underlying the claim of attempt to monopolize also constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act. *Specifically, plaintiff claims that defendants engaged in vertical price fixing, a horizontal territory division arrangement and a group boycott in furtherance of the attempt to monopolize the markets for athletic shoe inserts, ~~visco-elastic~~[3] polymer shoe inserts and Sorbothane athletic shoe inserts in the United States.* If you find on the basis of this conduct that plaintiff has proved a substantial claim of restraint of trade under the instructions you have received pertaining to Section 1 of the Sherman Act, then you may infer from such conduct that defendants had the specific intent to achieve monopoly power. Specific intent may also be inferred from conduct clearly threatening to competition or clearly exclusionary; that is, conduct whose anticipated benefits are dependent upon its tendency to discipline or eliminate competition and thereby enhance a firm's long term ability to reap the benefits of monopoly power.

AUTHORITIES:

Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1192-93 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); American Bar

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[3] Deleted by Court. J.A. 249.

Association Section of Antitrust Law, *Sample Jury Instructions in Civil Antitrust Cases*, Attempt to Monopolize – Instruction 3, pp. C-93 through C-94 (1987).

GIVEN AS REQUESTED _____

GIVEN AS MODIFIED _____

REFUSED _____

WITHDRAWN _____

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JUDGE, FEDERAL
DISTRICT COURT

PLAINTIFFS' PROPOSED INSTRUCTION NO. 126

ATTEMPT TO MONOPOLIZE

Exclusionary or Restrictive Conduct

Another element of the offense of attempt to monopolize is that defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent.

The offense of attempt to monopolize is concerned only with unreasonable acts or practices that have the actual or reasonably foreseeable effect of substantially impairing competition in a relevant market in an unnecessarily restrictive way or of destroying competition.

The antitrust laws encourage vigorous and honest competition, and the mere fact that one company is successful in winning sales or market share from its competitors does not mean that its conduct is exclusionary or anticompetitive. Conduct that involves the introduction of superior products, the lowering of production costs, the exercise of superior business judgment, or reasonably responding to competition can never be found to be exclusionary or restrictive. But some practices that promote competition in the short run may be illegal under the Sherman Act if they impair competition in an unnecessarily restrictive way or are used to attain a monopoly by eliminating competition.

Although the exclusionary or restrictive acts need not have been sufficient in themselves to bring about a monopoly, plaintiff must prove that the acts or practices engaged in by defendants had a significant exclusionary or restrictive effect or are of the type which, if continued are likely to result ultimately in a monopoly.

AUTHORITIES:

Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); American Bar Association Section of Antitrust Law, *Sample Jury Instructions in Civil Antitrust Cases*, Attempt to Monopolize – Instruction 4, pp. C-96 through C-97 (1987).

GIVEN AS REQUESTED _____

GIVEN AS MODIFIED _____

REFUSED _____

WITHDRAWN _____

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JUDGE, FEDERAL
DISTRICT COURT

PLAINTIFFS' PROPOSED INSTRUCTION NO. 127

ATTEMPT TO MONOPOLIZE

Lessig Rule

In some cases, it may not be necessary to prove a relevant market and a firm's power in that market in order to show a dangerous probability of success. A dangerous probability of success may be inferred either from direct evidence of specific intent plus conduct directed toward accomplishing the unlawful design or from evidence of conduct alone, provided that it is conduct that either forms the basis for a substantial restraint of trade or is clearly threatening to competition or clearly exclusionary.

Therefore, even if plaintiff has not proved that defendants had power in a relevant market, you may still find for plaintiff on the claim of attempt to monopolize if you find from direct evidence that defendants specifically intended to achieve monopoly power and you further find that defendants engaged in conduct harmful to competition in furtherance of that intent. Furthermore, even in the absence of direct evidence of specific intent, you may find for plaintiff if you conclude either that defendants engaged in conduct that formed the basis for a substantial restraint of trade under section 1 of the Sherman Act under the instructions you have received concerning conspiracies or combinations in restraint of trade or that the conduct was plainly harmful to competition or exclusionary, that is, that its benefits were dependent upon its tendency to discipline or eliminate competition and thereby enable defendant to reap the benefits of monopoly power in the future.

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AUTHORITIES:

William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1029-30, n.11 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); American Bar Association Section of Antitrust Law, *Sample Jury Instructions in Civil Antitrust Cases*, Attempt to Monopolize – Instruction 6, pp. C-102 through C-103 (1987).

GIVEN AS REQUESTED _____

GIVEN AS MODIFIED _____

REFUSED _____

WITHDRAWN _____

JUDGE, FEDERAL
DISTRICT COURT

PLAINTIFFS' PROPOSED INSTRUCTION NO. 128

ATTEMPT TO MONOPOLIZE - REFUSAL TO DEAL

Unilateral refusals to deal are acceptable only "[i]n the absence of any purpose to create or maintain a monopoly." Thus, a business, especially one with a large degree of market power, may violate Section 2 of the Sherman Act if it exercises its power to deal with others, including its own distributor, to achieve or maintain a monopoly.

Supply and credit restrictions imposed by a manufacturer upon a single distributor in an attempt to put the distributor out of business and thereby further manufacturer's attempts to monopolize have been held sufficient to support a claim for attempted monopoly.

AUTHORITIES:

United States v. Colgate & Co., 250 U.S. 300, 307 (1919); *General Industries Corporation v. The Hartz Mountain Corporation*, 810 F.2d 795, 803-804 (8th Cir. February 4, 1987).

GIVEN AS REQUESTED _____

GIVEN AS MODIFIED _____

REFUSED _____

WITHDRAWN _____

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JUDGE, FEDERAL
DISTRICT COURT